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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 157

MARK COPPEDGE, JR., PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 16, 1960
CERTIORARI GRANTED JUNE 19, 1961

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Misc. No. 1464

Criminal Case No. 579-58

MARK COPPEDGE, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

APPLICATION FOR LEAVE TO PROSECUTE AN APPEAL FROM A JUDGMENT OF CONVICTION IN THE DISTRICT COURT—Filed April 15, 1960

Comes now Mark Coppedge, Jr., the Petitioner in the above-entitled cause, and in support of my Application For Leave to Prosecute an Appeal from a judgment of conviction in the District Court; States as follows:

Jurisdiction of Court

Jurisdiction is conferred on this Court by 28 U.S.C. 1291 and 28 U.S.C. 1915.

The United States District Court for the District of Columbia had jurisdiction over this case under Title 22, 22-1801, 2201, 2202, 1401 of the District of Columbia Code (1951 Ed.), and Title 18, U.S.C. 1915.

Questions Presented

1. Whether the Court below erred by letting the prior testimony of a Government witness be admitted into evidence after a report from a Doctor stating that the witness was a mental patient; without the defense being given an opportunity to cross-examine said Doctor as to the mental condition of the witness at the petitioner's first trial especially in view of the fact that the Court limited the Defense's cross-examination of said witness (Mental Patient), at petitioner's first trial by stating that there was no need to cross-examine said witness any further, and that the Court wouldn't dare to send a person to jail on the testimony of said witness. The Court further stated

that it would so instruct the jury that it could not send petitioner to jail on said witness' testimony. The Court failed to do so.

[fol. 2] 2. Whether the District Court was in error by denying to enter into evidence for the defense, an Affidavit that had been signed by one Adam Artis (a witness for the prosecution at petitioner's first trial).

3. Whether the trial Judge erred by not granting petitioner's Motion for said Trial Judge to disqualify himself and let petitioner be tried by another Judge, and whether the trial Judge did, indeed, show prejudice against the petitioner by refusing to allow the petitioner to state his reasons for said Motion.

Statement of Case

The petitioner was indicted on 16 Counts involving the offenses of Housebreaking (Counts (1) Grand Larceny (Count (2), Forgery (Counts 3, 5, 8, 11, and 14), Uttering Forged Instruments (Counts 6, 9, 12 and 15), Attempting to Utter a Forged Instrument (Count 4), and Transporting, or causing to be transported, forged instruments in interstate commerce (Counts 7, 10, 13 and 16). Charged in the same indictment were Allen W. Alexander, Clarence H. Tyler, Clarence Tompkins and Adam Artis. Tompkins and Artis pleaded guilty during the course of the trial. Tyler was acquitted. Petitioner was convicted on counts 1 through 10 of the indictment, and sentenced to a prison term from two years to six years. Petitioner prosecuted an appeal and consequently this Court reversed the petitioner's case. (*Coppedge* v. *United States,* No. 14935, decided June 23, 1959.)

Petitioner went to trial again March 1, through March 8, 1960, and was found guilty on March 8, 1960. Thereafter, petitioner filed a timely notice of Appeal, and asked the District Court for leave to prosecute an Appeal in forma pauperis, the Order of that Court denying this application was entered March 22, 1960.

Argument

At the petitioner's second trial the Court allowed to be used as evidence against petitioner, testimony from a government witness who was, by a report from a doctor, a

mental patient. At the second trial, the petitioner's Counsel was not given the opportunity to cross-examine said doctor as to the mental condition of the witness.

[fol. 3] The Court also limited the Defense's cross-examination of said witness (Mental patient), at petitioner's first trial by stating that there was no need to cross-examine said witness any further, and that the Court wouldn't dare to send a person to jail on the testimony of said witness. The Court further stated that it would so instruct the jury that it could not send petitioner to jail on said witness testimony. The Court failed to instruct the Jury. (See Transcript of the petitioner's first trial.)

By the Court's own words, there was much doubt about the credibility of the oral testimony of said witness at the petitioner's first trial. This together with the fact that the Court limited the defense's cross-examination of said witness should have made the testimony (taken from the transcript of first trial. The witness was not produced in person at petitioner's second trial) inadmissible at the petitioner's second trial.

The Sixth Amendment of the U. S. Constitution guarantees a defendant the right to be confronted by the witnesses against him. The written testimony of a witness whose mental state at the time he gave the testimony, was questionable and can certainly not be used as fulfillment of this Constitutional provision, especially in view of the fact that the defense had denied the right to complete cross-examination of said witness.

Petitioner avers that the Trial Judge plainly erred by not granting petitioner's Motion for said Trial Judge to disqualify himself and let petitioner be tried before another Judge.

On January 22, 1960, petitioner, through his counsel, presented before the Trial Judge (Judge Holtzoff), a Motion to subpoena the transcript of the Grand Jury in regards to his case. At this time Judge Holtzoff made the uncalled for, un-proven, and highly prejudiced remarks, that petitioner had terrorized a former government witness. Since such a charge has never been placed against, or proven against petitioner, the remarks by Judge Holtzoff show that he was prejudiced against petitioner even before the trial.

Immediately before petitioner's second trial. When he

presented before Judge Holtzoff a Motion for Judge Holtzoff to disqualify himself and allow petitioner to be tried before another Judge, Judge Holtzoff bluntly refused to hear the petitioner's reasons for presenting the Motion before denying it.

[fol. 4] Also to be considered is the fact that petitioner was tried and found guilty on these same charges before Judge Holtzoff, and this Court reversed that conviction due to errors on the part of the Judge Holtzoff.

The U. S. Constitution guarantees a defendant a fair and impartial trial.

For the Court to have legally refused to allow to be entered as evidence for the defense an affidavit by one of the petitioner's former co-defendants vindicating petitioner from any part in the charged crimes; the Court would have first have had to show some evidence of coercion, threats, or promises. The Court did not do this.

Conclusion

Wherefore, petitioner pray that this Motion be granted, and that counsel be appointed to assist him.

Respectfully submitted, Mark Coppedge, Jr., Petitioner, Pro Se.

Subscribed and sworn to before me this 13 Day of April, 1960.

Edw J. Keightley, Notary Public.

My Commission Expires December 18, 1961.

Proof of Service [Omitted in printing]

[fol. 5] Affidavit of Poverty [Omitted in printing]

[fols. 6-13] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1464

[Title omitted]

Before: Prettyman, Chief Judge, in Chambers

ORDER APPOINTING COUNSEL—April 20, 1960

Upon consideration of the petition for leave to prosecute an appeal in forma pauperis, it is

Ordered that Bennett Boskey, Esquire, a member of the bar of this court, is appointed to represent petitioner and allowed until May 21, 1960 to file a memorandum in support of the petition.

Dated: April 20, 1960.

[fols. 14-17] [File endorsement omitted]

[fol. 18] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1464

[Title omitted]

MEMORANDUM IN SUPPORT OF PETITION FOR LEAVE TO PROSECUTE AN APPEAL IN FORMA PAUPERIS—Filed June 15, 1960

On April 20, 1960 this Court entered an order appointing the undersigned as counsel to represent petitioner, Mark Coppedge, Jr., in the above-entitled matter and allowing until May 21, 1960 to file a Memorandum in support of Coppedge's petition for leave to prosecute an appeal in forma pauperis. By this Court's orders dated May 24, 1960 and June 13, 1960, the time for filing the Memoran-

dum was extended until June 15, 1960. This Memorandum is filed pursuant to the foregoing orders of the Court.

As will appear below in more detail, this is a direct appeal in a criminal case. The case now comes to the Court of Appeals for a second time.

Coppedge was indicted in June 1958 on sixteen counts, which alleged breaking into a pharmacy and taking some property, including a check-writer and a batch of blank money orders, and thereafter filling in, forging, and cashing some of the money orders (Criminal No. 579-58 in the District Court). At the first trial, which took place before Judge Holtzoff and a jury, Coppedge was convicted on the first ten counts, and an acquittal was directed as to the last six counts. Four other persons—namely, [fol. 19] Clarence Thompkins, Adam H. Artis, Allen W. Alexander, and Clarence H. Tyler—had been charged in the same indictment; Thompkins, Artis and Alexander pleaded guilty and Tyler was acquitted. On Coppedge's appeal, this Court on June 23, 1959, reversed Coppedge's conviction because of certain prejudicial newspaper articles which had been published during the trial and because of the failure of the trial judge to take proper measures to determine the effects of such prejudice. (No. 14,935; reported at 272 F.2d 504.) After the case was remanded, the District Court on October 14, 1959 appointed Sidney A. Cohen, Esq., as counsel to defend Coppedge at the second trial.

After various preliminary proceedings, some of which will be described below in more detail, the case went to trial on the ten counts. The trial took place on March 2, 3, 4, 7 and 8, 1960 before Judge Holtzoff and a jury. The jury found Coppedge not guilty on counts 1 and 2, which were the house-breaking and larceny counts. It found him guilty on counts 3 through 10, which were counts relating to false and fraudulent money orders.

On March 11, 1960, Judge Holtzoff imposed sentence of twenty months to five years on each of Counts 3 through 10, the sentences to run concurrently (and to take effect at the expiration of a sentence Coppedge was then serving in Criminal Case No. 105-58). The judgment and commitment was filed March 14, 1960. On March 18, 1960 Coppedge, being then in custody at Lorton Reformatory, executed a notice of appeal and an affidavit in support of

application for leave to proceed without prepayment of costs. On March 21, 1960, Coppedge's affidavit in support of his application for leave to appeal in forma pauperis [fol. 20] and for a transcript at the Government's expense, was marked "filed" by the Clerk's Office of the District Court. On March 22, 1960, Coppedge's application was denied by Judge Holtzoff, who certified that the appeal "is frivolous and not taken in good faith", and who added the notation that "the defendant has had two trials and the jury convicted him both times on the counts on which he was sentenced." Coppedge thereupon filed his application with this Court for leave to prosecute the appeal on forma pauperis.

In connection with the preparation of this Memorandum, the undersigned has examined the documents on file in this case both in this Court and in the District Court; this has included an examination of the record on the first appeal (No. 14,935). In addition, the undersigned has discussed the case with the court-appointed attorney (Sidney A. Cohen, Esq.) who represented Coppedge at the second trial, the conviction in which is the subject of this appeal, and has obtained from Mr. Cohen and has examined such files as Mr. Cohen possessed relating to the case. In addition, the undersigned has discussed the case with Coppedge.

It is the conclusion of this Memorandum that substantial questions are presented by this appeal. They are questions which would have been deemed substantial long before the Supreme Court's decisions in *Johnson* v. *United States*, 352 U.S. 565 (1957); *Farley* v. *United States*, 354 U.S. 521 (1957); *Ellis* v. *United States*, 356 U.S. 674 (1958); *Cash* v. *United States*, 357 U.S. 219 (1958); and related cases. In the light of the standards which those decisions determine to be governing, it becomes even plainer that this appeal presents substantial questions since the questions could not, with any reasonable justification, be characterized as frivolous.

[fol. 21] This Memorandum will present the substantial questions to the limited extent that this can be done in the absence of a transcript of the proceedings. In doing so, however, it is emphasized that the absence of a transcript constitutes a most serious obstacle to the kind of examination and assessment which it should be possible

for counsel to make in evaluating and presenting the merits of a criminal appeal. In a case of this nature there is no real substitute for a transcript, if counsel is to be enabled to give full effect to the direction of the Supreme Court, in *Ellis* v. *United States*, supra, 356 U.S. 674, that "representation in the role of an advocate is required". Absence of a transcript in a case of this nature prevents counsel from having the information necessary to make proper assessment of possible errors in the light of the record as a whole. Absence of a transcript likewise prevents counsel appointed on appeal from discovering whether there should be urged on appeal other possible errors which may not have been noted, or may not be recalled, by either the defendant or by the trial counsel—but which nevertheless might constitute significant error, or plain error going to the justness and the fairness of the proceeding.

A. Substantial Questions Relating to the Validity of the Indictment

On November 17, 1959, before the trial, the defendant filed a motion to dismiss the indictment. The motion was heard before Judge McGuire on December 11, 1959, and by a memorandum order dated December 22, 1959 and filed December 24, 1959, Judge McGuire denied the motion. On December 29, 1959, the defendant moved to reconsider, and on January 4, 1960 Judge McGuire denied the motion for reconsideration.

[fol. 22] Denial of the motion to dismiss the indictment raises substantial questions.

The substance of the motion was that the indictment had been obtained on the basis of false and perjured testimony given by Clarence Thompkins to the grand jury. (Clarence Thompkins is the witness who at the first trial—as is set forth in this Court's opinion—had refused to testify). Attached to the motion were various documents. These included, as Exhibit 1, a signed statement by Clarence Thompkins (entitled "Affidavit with Acknowledgement"), dated November 18, 1958, stating that on May 27, 1958, Clarence Thompkins had discussed this case with FBI agent Joseph Woods; that Clarence Thompkins gave a false statement pertaining to the facts of said indictment against Coppedge after being promised by Agent Woods

that housebreaking charges against Clarence Thompkins would be dismissed if Clarence Thompkins would help to secure an indictment against Coppedge and one Clarence Tyler; that on or about June 3 and 4, 1958, Clarence Thompkins was brought to the U.S. District Court for a discussion with the U.S. District Attorney and was escorted to the grand jury room, where Clarence Thompkins gave false statements, implicating Coppedge in this offense, upon being promised by the U.S. Attorney that all other offenses would be dismissed against Clarence Thompkins upon entering a plea of guilty;[1] that this statement is not made under duress but of Clarence Thompkins' own free will and volition.

[fol. 23] Also attached to this motion, as Exhibit 2, was a letter Clarence Thompkins had written.[2] Clarence Thompkins' letter stated, among other things, that he was writing without threat or duress, of his own free will, to clear his conscience as he felt he and others had caused a great miscarriage of justice; that on May 27, 1958, Clarence Thompkins had been interviewed by FBI Agent Joseph Woods and truthfully admitted he and one Quincy McCall had committed the crime; that on June 4, 1958, Clarence Thompkins was brought to the U.S. District Court for a discussion with Mr. Flannery of the District Attorney's office and Mr. Wood, being promised by Mr. Wood and Mr. Flannery that housebreaking charges against Clarence Thompkins would be dismissed if Clarence Thompkins would help to secure indictment against other defendants;

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[1] The record shows that the indictment in this case was filed on June 16, 1958, and that Clarence Thompkins pleaded guilty on July 22, 1958.

[2] The original of the letter apparently was addressed and sent to Judge Holtzoff. The copy attached to the motion was a copy sent and addressed to Stanley M. Dietz, Esq., the attorney who had represented Coppedge at the first trial. At the sentencing of Coppedge on January 23, 1959 after the conviction at the first trial, the transcript (January 23, 1959, pages 1-2) shows that Mr. Dietz then brought to Judge Holtzoff's attention the fact that Mr. Dietz had received this letter; that Judge Holtzoff said the Judge had received the original of the letter from Thompkins.

that Clarence Thompkins was escorted to the grand jury room where he gave false statements implicating others; that after the indictment was returned on June 16, 1958, Clarence Thompkins had told his court-appointed counsel that he had made false statements to the grand jury, and his counsel had advised that Clarence Thompkins did not have to testify any more in the case; that a great miscarriage of justice had been done and the wrong person [the context shows this clearly refers to Coppedge] had been found guilty.

[fol. 24] Also attached to the motion, as Exhibits 3 and 4, were two unsigned statements, which apparently had been written out for proposed signature by Clarence Thompkins, in which the substance of the foregoing appeared, together with a statement that Clarence Thompkins "made certain false and misleading statements concerning Mark Coppedge, Jr., . . . such statements being prompted by Mr. Woods".

For this Court's convenience there is attached as Exhibit A to this Memorandum a copy of Judge McGuire's memorandum opinion denying the foregoing motion to dismiss the indictment. Judge McGuire's opinion appears to proceed on the basis that the allegations of perjury, supported by direct admissions to that effect from Clarence Thompkins, must for the purposes of the motion be assumed to be true. Indeed, since Judge McGuire did not hold any hearing or make other inquiry to determine whether Thompkins' express admission of perjury was or was not true, the existing state of the record made it necessary for him to decide the motion on the assumption that in fact Thompkins had committed perjury in implicating Coppedge before the grand jury prior to its indictment of Coppedge. Assuming that Thompkins had in fact perjured himself in such grand jury testimony, Judge McGuire then proceeded to rule that this would not affect the validity of the indictment. The correctness of this ruling, and the manner in which it was made, raise substantial questions for appeal.

1. *Whether the indictment is open to attack on the ground that the grand jury based its action on important testimony shown before the trial to have been false and perjured.*

To the extent that the District Court's ruling seems to rely in part on some principle that the nature of the evi-[fol. 25] dence before the grand jury is not subject to any inquiry whatsoever for the purpose of testing the validity of the indictment. Such ruling goes far beyond existing precedents and into an area where the law appears to be largely unresolved. Judge McGuire cited for support *Costello* v. *United States*, 350 U.S. 359 (1956). That, however, was a very different case. As appears from the Supreme Court's opinion, 350 U.S. at 359, *Costello* presented for decision the single question whether a defendant might be required to stand trial and a conviction might be sustained where the only evidence presented to the grand jury which indicted him was hearsay evidence. The Supreme Court there reviewed the history of the grand jury as an institution and came to the conclusion that the single question should be answered in the affirmative; the fact that all the evidence which had been presented to the grand jury was hearsay, which would not have been admissible at the trial, was held not to defeat the validity of the indictment. In other words, grand jury proceedings are not to be reviewable for the purpose of ascertaining merely whether the rules of evidence have been followed in the grand jury proceedings. Stated another way, there is no substantive requirement that all the rules of evidence be strictly followed in grand jury proceedings.

The policy considerations supporting this result would appear to be largely inapplicable to a case where it affirmatively appears not merely that the evidence before the grand jury was hearsay or otherwise incompetent under the rules of evidence, but rather that false and perjured testimony constituted the basis—or a substantial basis—for the action taken by the grand jury. The question raised by perjurious testimony given before the grand jury is [fol. 26] not simply whether such evidence would be legally competent at the trial of the case; rather it is the fundamental question whether the grand jury has relied on wilfully false and perjured testimony in making up its mind to return the indictment. When such a situation is made

duly manifest to the court before the trial has begun—and indeed before the statute of limitations has run, so that grand jury consideration of whether a new indictment should be obtained is not precluded—then the proper administration of criminal justice should require that the challenged indictment be set aside.

There is an elaborate review of federal decisions in an Annotation appearing in 100 L.Ed. 404-412 (following the *Costello* opinion), entitled "Competency or Sufficiency of Evidence Before Grand Jury as Affecting Validity of Indictment or Conviction in Federal Court". The cases there collected do not reflect any express line of authority in the federal courts on the question whether, when there is a showing that important evidence brought before the grand jury was false and perjured, the indictment should be dismissed. No decision has been found in the Supreme Court or in this Court or in the Court of Appeals of any other Circuit, either before or since the *Costello* case, which forecloses—or indeed even passes upon—such question. While its merits can be argued more extensively when this appeal is heard, for present purposes it suffices that the question presented is a substantial one.

2. *Whether an indictment based on substantial false and perjured testimony is automatically salvaged by the fact that "other competent evidence" may have also been before the grand jury.*

Judge McGuire's memorandum opinion shows also that [fol. 27] he made an *in camera* inspection of the grand jury minutes for June 4, 1958—an *in camera* inspection which he stated he made "with an eye toward the exclusion of the alleged perjurious testimony" of Clarence Thompkins. The memorandum opinion relies on Judge McGuire's conclusion that the Judge was satisfied there was sufficient other competent evidence against Coppedge to support the indictment.

In this connection it appears from the various documents filed in the court below that the U.S. Attorney's Office furnished to Judge McGuire at least a partial transcript of the grand jury proceedings, but refused to make such transcript available to defense counsel. Moreover, a motion to compel the grand jury transcript to be furnished to the

defense was made, was strongly pressed, and was denied by the District Court.[3]

In this posture, this aspect of the case presents additional substantial questions for review on appeal. One is whether Judge McGuire was correct in the standard which he applied—namely, that where significant false and perjured—testimony has been given before the grand jury and has formed a substantial basis for the indictment, nevertheless this is immaterial so long as there was presented to the grand jury some other competent evidence. Whether this standard is correct or incorrect is clearly a substantial question, and on appeal it will be urged that the standard applied by Judge McGuire is incorrect.

[fol. 28] A closer formulation of the proper criterion in such a case would appear to be whether it can be known with reasonable certainty that the grand jury would have returned the indictment anyway—even if the false and perjured testimony had not been brought before it or if the grand jury had known that in fact such testimony was false and perjured. If that is the more appropriate criterion, then this indictment should have been dismissed against Coppedge and the matter sent back to a grand jury for fresh consideration without the use of Thompkins' wilfully false and perjured testimony. Moreover, on this record—to borrow the language of the Supreme Court and of this Court in a somewhat different situation, *Griffin v. United States*, 336 U.S. 704, 709 (1949); 183 F.2d 990, 992 83 App. D.C. 351, 353 (1949)—it would certainly be "too dogmatic, on the basis of mere speculation, for any court to conclude" that the grand jury would not have attached significance to the fact that Thompkins' important testimony was false and perjured had such information been available to the grand jury.

As the Supreme Court has said with respect to the analogous situation of false and unreliable testimony of an important prosecution witness at a trial: "The government of a strong and free nation does not need convictions based

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[3] Such motion was filed December 24, 1959, supported by a memorandum of points and authorities, and was argued on January 22, 1960 before Judge Holtzoff, who denied the motion.

upon such testimony. It cannot afford to abide with them". *Mesarosh v. United States*, 352 U.S. 1, 14 (1956). Equally, the government of a strong and free nation does not need indictments based upon such testimony, and it cannot afford to abide with them.

3. ***Whether the grand jury transcript should have been made available to defense counsel as demanded.***

As already stated (see page 10, supra), the District Court [fol. 29] refused to allow defense counsel to inspect the grand jury transcript. This ruling effectively deprived the defense of an opportunity to examine the transcript and to make such argument as might be appropriate to the effect that the false and perjured testimony of Thompkins constituted the sole basis for the grand jury's having indicted Coppedge; or to the effect that the false and perjured testimony of Thompkins constituted the principal basis, or the most important basis, or a very important basis, or a major or significant basis, for the grand jury's having indicted Coppedge. Under the circumstances of this case this refusal of the grand jury transcript to the defense is a matter which raises a substantial question for appeal.

Grand jury proceedings are normally surrounded by secrecy, but the authorities make it clear that such secrecy is to be broken where there is a compelling necessity, or where there is a showing of good cause—such as, that without the transcript the defense would be greatly prejudiced or that without reference to the transcript an injustice would be done. *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682-684 (1958); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959); compare *Parr v. United States*, 265 F. 2d 894, 901-904 (5th Cir. 1959), certiorari granted, 361 U.S. 912 (1959), now awaiting decision. "After the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940).

Here it certainly appears to be a substantial question whether the ends of justice required it. Thompkins had expressly admitted his perjury, so no proper purpose could have been served by keeping Thompkins' grand jury testimony undisclosed. The case had, moreover, already gone through a first trial (with conviction reversed on appeal by

[fol. 30] this Court), so that continued secrecy of the grand jury transcript as to other witnesses would not even have served the purpose of enabling the prosecution to obtain the usual benefits of surprise in presenting its evidence at the trial. Under the circumstances, there appear to have existed no substantial significant considerations in favor of secrecy which should have outweighed the need of disclosure in order to enable the defense to have the facts reasonably necessary for the effective presentation of its position. Defense counsel showed "a particularized need" for the grand jury minutes, *Pittsburgh Plate Glass Co. v. United States*, supra, 360 U.S. at 400, and they should have been made available to him.

4. *Whether in any event the District Court erred in determining that there was other competent evidence before the grand jury sufficient to support the indictment.*

Even if the District Court were to be sustained in its refusal to disclose the grand jury transcript to defense counsel, the proper exercise of appellate responsibilities would require this Court on appeal to examine into the correctness of the District Court's *in camera* determination that there actually was other competent evidence before the grand jury sufficient to sustain the indictment. The cases just cited show that the discretion of the trial judge in deciding whether the grand jury transcript should be disclosed or withheld is not absolute, and that it is subject to appellate review. Moreover, where the trial judge has examined the grand jury transcript *in camera*, and the defense has been denied access to the grand jury transcript, the minimum obligation of the appellate court is to [fol. 31] make a similar *in camera* examination to determine whether the trial court's conclusion was right or wrong. *United States* v. *Spangelet*, 258 F. 2d 338, 341-342 (2nd Cir. 1958); *United States* v. *Zborowski*, 271 F. 2d 661 (2nd Cir. 1959); *United States* v. *McKeever*, 271 F. 2d 669, 672-673 (2nd Cir. 1959); compare *Palermo* v. *United States*, 360 U.S. 343, 355 (1959); *Rosenberg* v. *United States*, 360 U.S. 367, 369 (1959). This is required by the need for both fairness and the appearance of fairness; the defendant's counsel even now cannot know what is in the grand jury transcript. The defendant must rely upon this Court's

careful exercise of appellate review *in camera*, or else there would be no appellate review at all on such a question.

Accordingly, it is certainly required in the interests of fair and orderly procedure that this Court at least should make its own *in camera* examination of the grand jury transcript to ascertain whether, apart from Clarence Thompkins' perjury, there was indeed any other evidence before the grand jury; and if so whether—under whatever criterion may be applicable—such evidence was adequate to sustain the indictment against the challenge made. Until this Court, as a part of its appellate review of the case, has made such an *in camera* examination of the grand jury transcript, no determination could properly be made that this issue fails to raise a most substantial question.

5. *Whether in any event the District Court, before determining that the indictment should be upheld, should have made a factual inquiry into whether government agents were responsible for inducing false and perjured testimony by Clarence Thompkins for presentation to the grand jury.*

The allegations in and the Exhibits attached to the mo- [fol. 32] tion, (see pages 5-7, supra), while perhaps somewhat inartistically expressed sufficiently raised this question so that the District Court should have made an inquiry into the facts.

The long line of decisions beginning with *Mooney* v. *Holohan*, 294 U.S. 103 (1935), and extending through *Napue* v. *Illinois*, 360 U.S. 264 (1959), and *Wilde* v. *Wyoming*, Supreme Court, October Term 1959, No. 645 Misc., decided May 16, 1960, have established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Due Process Clause; that the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears; and that there is a constitutional requirement for such issues to be cognizable not merely on direct appeal but also by collateral attack on the conviction. No case has been found expressly determining whether these principles likewise apply to determining the validity of an indictment. But as a matter of principle the taint would appear to be comparable; and the obligation to wipe out the taint by dismissing the indict-

ment would appear to be equally compelling, both as a matter of constitutional law under the Due Process Clause of the Fifth Amendment and as a matter of proper judicial supervision over the administration of criminal justice in the federal courts.

The full implications of this position can be argued more extensively when the appeal is heard on the merits. For present purposes, it is sufficient that the question is a substantial one; and if it is a substantial one, then it is likewise a substantial question whether, on the present record, the District Court should have made inquiry into the facts —which it failed to do—to determine whether government [fol. 33] agents were responsible for inducing false and perjured testimony by Clarence Thompkins for presentation to the grand jury. If they were, the indictment thereupon returned against Coppedge is most clearly "a fruit of the poisonous tree", *Nardone* v. *United States*, 308 U.S. 338, 341 (1939), and it would be unconscionable for the indictment to be allowed to stand, particularly in a case such as this where timely challenge was made to it before the trial.

B. Substantial Questions Relating to Judge Holtzoff's Summary Denial of Motions That He Should Disqualify Himself.

It has been stated to the undersigned that, just before the trial began, two oral motions were made to Judge Holtzoff that he should disqualify himself and allow the defendant to be tried before some other judge; and that Judge Holtzoff summarily denied the motions without affording any opportunity whatsoever to the defendant or his counsel to state to Judge Holtzoff the substantive grounds on which the motions were based. In his application to this Court (page 3), Coppedge has stated that the ground for this motion was that in a hearing on a preliminary motion on January 22, 1960 "Judge Holtzoff made the uncalled for, un-proven, and highly prejudiced remarks, that petitioner had terrorized a former government witness. Since such a charge has never been placed against, or proven against petitioner, the remarks by Judge Holtzoff show that he was prejudiced against petitioner even before the trial."

It is certainly exceptionally difficult for counsel newly appointed on appeal to assess this point without having available the written transcript of what Judge Holtzoff said on January 22, 1960, the written transcript of what [fol. 34] occurred when the motions to disqualify were made, and indeed the written transcript of the remainder of the trial which would disclose whether any manifestations of prejudice on the part of the judge are reflected elsewhere in the written record. On the basis of what does exist, in the absence of such transcripts, there do appear to be substantial questions raised here for consideration on appeal.

Judge Holtzoff had presided at the first trial of this case, the conviction in which was reversed by this Court because of errors he had committed. The remarks attributed to Judge Holtzoff, which it is said that he made in court at the hearing on a motion on January 22, 1960, apparently refer to Coppedge's alleged "terrorization" of Clarence Thompkins—an unproved accusation against Coppedge, some aspects of which were discussed in detail in this Court's opinion on the first appeal. Moreover, in the letter which Clarence Thompkins had written to Judge Holtzoff prior to the imposition of sentence on Coppedge after the first trial (referred to at page 6, note 2, supra), Clarence Thompkins had also written with respect to this episode:

> "On December 10-58 I was brought into Your Honor's court to testify falsely, which I refused to do so, and was found guilty of criminal contempts of court. It was told to Your Honor, by attorney Letterman and Mr. Flannery that I was in fear of one of the defendant in the case, which is not true at all."

If Judge Holtzoff did in fact make any such statements on January 22, 1960, as are attributed to him, they certainly would give rise to an appearance of prejudice which would make it unfair for Coppedge to be required to be tried before Judge Holtzoff.

The filing of a statutory affidavit of prejudice under 28 U.S.C. § 114 is by no means the only proper way, under all circumstances, for a question as to disqualification for [fol. 35] prejudice to be given consideration. Indeed, in *Offutt v. United States*, 348 U.S. 11 (1954), the Supreme Court itself directed that a second trial should be before a

different judge. In certain other cases motions, or appropriate protestation on appellate review, have been deemed adequate and sufficient methods for raising the issue of whether the requisite standards have been adhered to. *Whitaker* v. *McLean*, 118 F.2d 596, 73 App. D.C. 259 (1941); *Moskun* v. *United States*, 143 F.2d 129 (6th Cir. 1944); *Knapp* v. *Kinsey*, 232 F.2d 458, 465-467 (6th Cir. 1956), certiorari denied, 352 U.S. 892 (1956). As this Court stated in *Whitaker* v. *McLean*, supra:

> "Few, if any judges would make the reported remarks in the course of a trial, unless they had developed a definite and positive hostility to plaintiff and his case. • • • [A] right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial."

The principles thus expressed so clearly in a civil case apply with even greater force to criminal cases.

Furthermore, if the transcript also should show that Judge Holtzoff refused to afford the defense an opportunity for stating to him the grounds of the motions, then such action would underscore the arbitrary and unfair nature of what occurred. Only recently the Supreme Court has reiterated the importance of "the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice' ". *Levine* v. *United States*, October Term 1959, No. 164, decided May 23, 1960. In the light of what is presently known about the events in this case—and subject to the limitations imposed by the absence of the pertinent transcripts—substantial questions are presented here on appeal.

[fol. 36] C. Substantial Questions as to Prejudice Resulting from Prosecution's use of Testimony Given at First Trial by the Co-Defendant Artis

At the first trial one of the prosecution's witnesses against Coppedge had been the co-defendant Artis (see J.A. 57-59, 62-74 in No. 14,935). It has been stated to the undersigned that at this second trial the prosecution informed the trial judge that Artis was unavailable, because confined with illness at an institution in North Carolina; and that there-

upon, over objection of the defendant, the trial judge permitted Artis' testimony at the first trial to be introduced in evidence against Coppedge at this second trial. Out of these events arise a series of substantial questions on appeal. While a full assessment of them must await the existence of the transcript, their substantiality does not appear to be in doubt.

1. *Whether under the circumstances of this case it was error to read into evidence the testimony given by Artis at the first trial.*

The right of confrontation in criminal cases is protected by the Sixth Amendment and the courts have been "zealous to protect these rights from erosion". *Greene* v. *McElroy*, 360 U.S. 474, 497 (1959). In exceptional cases the testimony given by a witness at a prior trial may be introduced in evidence at a subsequent trial, but this is subject to careful safeguards. Adequate showing must be made of the supervening death or legal unavailability of the witness. *Meyers* v. *United States*, 171 F.2d 800, 84 App. D.C. 101 (1948); *Tatum v. United States*, 249 F.2d 129, 131, 101 App. D.C. 373, 376 (1957); *Christoffel* v. *United States*, 200 F.2d 734, 741-743, 91 App. D.C. 241, 248-250 (1952), vacated for re-[fol. 37] sentencing, 345 U.S. 947 (1953). If the witness is available the prior testimony cannot be received, *Piassick v. United States*, 253 F.2d 659, 661-662 (5th Cir. 1958); and the prior testimony should be excluded where "no sufficient basis was laid for the introduction of the testimony." *Smith* v. *United States*, 106 F.2d 726, 728 (4th Cir. 1939).

It is highly questionable that any sufficient showing was made here, since nothing more appears than a telegram dated February 8, 1960 (nearly a month before the trial), addressed to the prosecutor, and reading as follows:

> "Confirming our telephone conversation in regards to Adam H. Artis. He is presently under my care and in my opinion unable to appear in court. Diagnosis is chronic lymphatic leukemia, chronic brain syndrone, paranoid, schizophrenia with mental deterioration. Can supply further detailed information if necessary. Edgar T. Beddingfield."

It is conceivable that something more would appear in the transcript. But in the absence of a transcript a substantial question exists whether enough was shown by a mere telegram, particularly when the telegram was not fortified by any appropriate affidavits, nor was it backed up by producing the doctor who sent the telegram as a witness subject to cross-examination concerning Artis' actual mental condition. Moreover, the undersigned has been informed that this was done without adequate prior notice by the prosecution; that accordingly there was no reasonable opportunity for the defense to investigate the facts prior to the Artis testimony being read to the jury; and that despite defense objections, demanding time be first afforded for the defense to make suitable investigation, Judge Holtzoff permitted the Artis testimony to be read to the jury forthwith. [fol. 38] If the transcript substantiates this sequence of events, the unfairness and the prejudice effected seem evident.

In addition, Coppedge in his application to this Court (pages 1 and 2) has complained that an opportunity was not afforded to cross-examine the doctor who sent the above-quoted telegram, to ascertain whether the mental illness with which the telegram said Artis was then afflicted was such as to reflect also upon Artis' mental competency at the time of the first trial. Particularly in view of the fact that the telegram described Artis' mental illness as including "Schizophrenia with mental deterioration"—an illness which presumably had a long history—there is underscored the unfairness of reading into evidence this Artis testimony without having required the prosecution to first produce Dr. Beddingfield as a witness. If development of the facts would have shown that Artis had lacked mental competency at the time of the first trial, then this surely would have been an exceptional circumstance requiring that the Artis testimony given at the first trial be excluded in its entirety at the second trial. Indeed, for Coppedge to be convicted on the basis of testimony given by a witness who lacked mental competency at the time the witness had testified—such a result would be something "out of the question". *Kelley* v. *United States*, 236 F.2d 746, 750, 99 App. D.C. 13, 17 (1956).

2. *Whether the District Court erroneously excluded evidence that Artis had entirely retracted his testimony implicating Coppedge.*

The undersigned has been informed that the defense sought to introduce into evidence a statement which ap-[fol. 39] peared to have been signed in two places by Artis, which wholly contradicted the testimony Artis had given at the first trial implicating Coppedge. The statement, which is undated but apparently was signed subsequent to the first trial, is reproduced photostatically on the next page:

[fol. 40] UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

I, Adam H. Artis, am making this statement of my own free will and to the best of my knowledge, this statement is being made only to clear my own concience and is the truth to the best of my knowledge. I am not under duress mentally or physically as far as making this statement:

Statement of Facts

I, Adam H. Artis, after having several drinks whisky and wine with a fellow whom I recall as Quincy, at his apartment, did leave with him (Quincy) to several places in which I was given by him (Quincy) money orders to cash. I cash one and received funds from him (Quincy) for doing so, and as I can remember I attempted to cash several more without any success. I don't quite recall where these places were that I cashed and attempted to cash the money orders, all of this taken place in the month of December 1957, within the District of Columbia.

I had no connections with any of the other defendents in this case concerning the money orders from December till now and know not of what concern they are to this case.

I, Adam Artis do solemnly swear that the foregoing statement is true to the best of my knowledge and is made for the benefit of clearing my concience and for justice, for I have just suffered a stroke.

I, have read and understand this statement in full, therefore I affix my signature to verify same.

Adam Artis.

Subscribed and sworn to before me this day of —, 19—.

——— ———,
Notary Public.

[fol. 41] The undersigned has further been informed that when the defense sought to introduce this statement into evidence, the defense pointed out that Artis' signature on the statement appeared to be the same as his signature on one of the money orders which Artis had signed; that Judge Holtzoff said he did not doubt that the signatures were the same; but that Judge Holtzoff would not allow the Artis statement to be received in evidence because the statement itself, apart from the signature, was not in Artis' own handwriting. If the transcript shows this to be what happened, the error seems manifest. There is no requirement that otherwise admissible statements be in an individual's own handwriting—provided that they are duly signed or otherwise properly established as the statement of the individual concerned. Indeed, nowadays the great bulk of statements are typed, instead of being hand-printed as this one was, and no one has ever suggested that the fact that they are typed renders them inadmissible. Moreover, the undersigned also has been informed by Coppedge that the defense had available and wished to call as a witness one Robert Bush, who was available to testify that he (Bush) was present when Artis gave this signed statement to Coppedge at Lorton Reformatory, but that Judge Holtzoff ruled that such testimony by Bush would be "hearsay" and refused to allow it to be given.

The Supreme Court recently has said: "It is, of course, an elementary rule of evidence that prior statements may be used to impeach the credibility of a criminal defendant or an ordinary witness." *Grunewald* v. *United States*, 353 U.S. 391, 418 (1957). No different rule can properly be applied in criminal cases where, as here, a prosecution [fol. 42] witness who at the first trial has implicated the defendant thereafter makes statements which not merely impeach but entirely contradict his testimony, and the wit-

ness then dies or becomes otherwise unavailable before the second trial. Indeed, if the rule were otherwise, a defendant in a criminal case could be convicted on the basis of testimony later repudiated by the witness as wholly perjurious; the prosecution would nevertheless be able to use such testimony, uncontradicted, because of the accident that the witness had died or become otherwise legally unavailable between the time of the repudiation and the time of the second trial. Such an unconscionable result would not be consistent with the principles of fundamental fairness and of sound policy required in the administration of criminal justice in the federal courts.[4]

From the foregoing—and subject once again to the limitations imposed by the absence of the transcript—it would appear first, that, for reasons previously indicated, it was improper for Artis' prior testimony implicating Coppedge to be introduced into evidence; and then that important probative evidence, establishing admissions by Artis that his prior testimony was false and incorrect, was improperly excluded by the trial judge.

If Artis' testimony at the first trial was to be available for use by the prosecution at the second trial, then the most [fol. 43] elementary considerations of fairness and justice required that evidence of Artis' subsequent repudiation of such testimony be similarly available for use by the defense.

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[4] To the extent that the closely-divided decision in *Mattox* v. *United States*, 156 U.S. 237 (1895) may appear to be to the contrary, it was soon limited by the Supreme Court itself, *Carver* v. *United States*, 164 U.S. 695, 698 (1897); it cannot be reconciled with later developments in the criminal law, see, for example, *People* v. *Collup*, 27 Cal. 2d 829, 167 P. 2d 714 (1946); *Harschbert* v. *State*, 117 Tex. Cr. 504, 506-508, 35 S.W. 2d 430, 431 (1930); compare 3 Wigmore, Evidence § 1932; it is out of harmony with "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" (Rule 26 of the Federal Rules of Criminal Procedure); and it should not be revived.

3. *Whether Judge Holtzoff erroneously failed and refused to inform the jury of the deficiencies and weaknesses he himself had noted in Artis' testimony at the first trial.*

At the first trial Judge Holtzoff had stated that "if requested, I shall instruct the jury that Artis . . . is not too reliable a witness" (J.A. 75 in No. 14,935), and Judge Holtzoff had in fact instructed the jury that "Artis was somewhat confused on the witness stand and you have a right to consider that in determining the weight to attach to his testimony" (J.A. 121 in No. 14,935). Judge Holtzoff also had instructed the jury that Artis "was a little uncertain as to whether he gave the money to Coppedge or Alexander because he seemed to waver back and forth" (J.A. 121-122 in No. 14,935). In addition, at the first trial Judge Holtzoff had stated (Tr. 322 in No. 14,935): "I want to ask the government a question which might perhaps shorten matters a little bit. To what extent are you going to rely on the Artis testimony? I would not send anybody to the penitentiary on the testimony of Artis. You would not either if you were a Judge."

The undersigned has been informed that at the second trial Judge Holtzoff failed and refused to make known to the jury these inescapable limitations on Artis' testimony, which were based on his own observation of Artis on the witness stand at the first trial. Indeed, these statements which Judge Holtzoff made concerning Artis at the first trial fortify the unfairness of allowing his testimony to be [fol. 44] used at all at the second trial. Moreover, under the exceptional circumstances of this case, the effect of allowing Artis' prior testimony to be read to the jury without any similar admonition whatsoever was to work serious prejudice against Coppedge. If Artis' testimony was to be used at all in the second trial—a matter which is in controversy for reasons already stated—then it was unfair to use it without the clear limitations which the first trial had so plainly developed.

4. *Whether errors were committed in receiving the rebuttal testimony of FBI Agent Darlington on the Artis matter.*

It has been stated to the undersigned that as a rebuttal witness the prosecution called on FBI agent named Dar-

lington, who over objection was permitted to testify that he had interviewed Artis in a jail in North Carolina in the latter part of November or first part of December 1958; that Artis at that time had implicated Coppedge in the offense and had made a written statement that that effect;[5] that when asked by the defense counsel where the alleged written statement was, Darlington testified it was somewhere en route between Darlington's home office in Charlotte, North Carolina, and Washington, D.C.; and that the trial judge thereupon refused defense counsel's request that [fol. 45] the trial judge be held open until the written statement was produced by the Government and could be examined.[6] Darlington, it is understood did not testify as a witness at the first trial.

Subject to such clarification as may occur when the transcript becomes available, this receipt of testimony from Darlington appears to raise a number of additional substantial questions for appeal. One is that the testimony was plainly hearsay; that there does not appear to be any

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[5] The transcript of the first trial shows (Tr. 284, 288) that Artis testified he had signed a statement for the FBI, and that the prosecutor then handed a five-page longhand statement to the attorney who represented Coppedge at the first trial. Artis further had testified at the first trial (Tr. 295-298, 311) that this statement had been written out by the FBI agent after the FBI had questioned him when Artis had been arrested on November 25, 1958 in Wilson, North Carolina; that this was the only statement he had signed for the FBI; and at the first trial the statement was marked Defendant's Exhibit No. 4 for identification (Tr. 292). It does not appear whether that statement was the same one here in issue at the second trial.

[6] An Exhibit List in the files of the District Court for the second trial lists as Government's Exhibit No. 10, marked for identification on March 9, 1960, an item entitled "Statement of Artis to FBI"; the Exhibit List does not otherwise indicate whether this item was an original or a purported copy, and in any event the Exhibit List indicates that the item was not introduced into evidence. The transcript may well provide some clarification on this point.

recognized exception to the hearsay rule which would have warranted admitting this testimony in a criminal trial; and that for this reason the testimony should have been excluded. *Kelley* v. *United States*, 236 F.2d 746, 750, 99 App. D.C. 13, 17 (1956); *United States* v. *Rams*, 268 F.2d 878, 881-882 (2nd Cir. 1959); *Smith* v. *United States*, 215 F. 2d 682, 94 App. D.C. 320 (1954). Another is that even if evidence of this kind were otherwise admissible, here the "best evidence" rule was plainly violated, since the Government had readily available the signed original of the Artis written statement, and therefore the prosecution should have been required to use that rather than what [fol. 46] Darlington said about it. 4 Wigmore, Evidence, § 1173-1175; *Watson* v. *United States*, 224 F.2d 910, 911-912 (5th Cir. 1955); *Meyers* v. *United States*, 171 F.2d 800, 813, 84 App. D.C. 101, 113 (1948), certiorari denied, 336 U.S. 912 (1949). Still another is that the actions of the prosecution and the trial court on this matter appear to be in plain violation of the provisions and the policy of the "Jencks Act", 18 U.S.C. § 3500; once Artis' testimony was used in evidence by the prosecution, the obligation to produce the Artis written statement, admittedly in possession of the Government, was clear. Compare *Howard* v. *United States*, No. 15,449, decided by this Court May 5, 1960. The failure to produce it necessitated, under the circumstances of this case, that a mistrial be declared.

Each of these contentions presents a substantial question on appeal.

Conclusion

The foregoing is a presentation of the substantial questions which appear to exist on appeal, so far as such a matter can be assessed in the absence of a transcript. But there may well be various other substantial questions disclosed by the transcript; also, the transcript may well lead to a somewhat different evaluation of the questions which are here presented. Moreover, some of the errors complained of may be significant not merely in isolation; they may have caused cumulative prejudicial effects which can be disclosed only by having a transcript to examine. [fols. 47-48] For the reasons which have been set forth, Coppedge should be granted leave to prosecute his appeal

in forma pauperis, and the transcript should be ordered to be prepared at the expense of the United States.

Respectfully submitted, Bennett Boskey, 1701 K Street, N.W., Washington 6, D.C., Attorney for Mark Coppedge, Jr., by appointment of this Court.

Certificate of Service (omitted in printing)

[fol. 49] EXHIBIT "A" TO MEMORANDUM

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 579-58

UNITED STATES,

v.

MARK COPPEDGE, JR., et al.

Memorandum

This cause came on to be heard on the motion of the defendant, Mark Coppedge, Jr., to dismiss the indictment under Rule 12(b)(2) of the Federal Rules of Criminal Procedure.

Essentially, the defendant contends that his indictment was secured as the result of perjured testimony given at the proceedings before the Grand Jury by a co-defendant, one Clarence Thompkins. Because of this alleged act of perjury, the defendant maintains that his rights under the Fifth Amendment were violated. Specifically, he contends that he is, at this juncture, being held in contravention of the constitutional prohibition against the holding of a person to answer for an infamous crime unless a true bill has been returned against him by the Grand Jury. This claim is predicated upon the theory that there could not have been a valid indictment returned against him by this Grand Jury because of the alleged perjured testimony of the co-defendant as evidenced by the so-called affidavit of the co-defendant. The Court is of the opinion that the con-

stitutional contention advanced by the defendant is not sound.

By definition, an affidavit is any voluntary *ex parte* statement reduced to writing and sworn to or affirmed before some person legally authorized to administer an oath or affirmation. (1 *Am. Jur.* 934.) Furthermore, it may be assumed that the information in the affidavit is accurate and true to the best of the affiant's knowledge and belief. (*Johnson Broadcasting Co.* v. *F.C.C.*, 85 U.S. App. D.C. [fol. 50] 40 (1949).) In the instant case, the defendant asserts that Exhibit 1, which apparently purports to be an affidavit and is entitled "Affidavit With Acknowledgement", and which was allegedly signed by the above-mentioned co-defendant, sufficiently attacks the foundation upon which this indictment against the defendant rests so as to justify or compel its dismissal. In the circumstances, however, the Court can only conclude that this statement, along with the other letters and statements filed in this case and alluded to in the motion, constitute a gratuitous attempt to undo what was done at the time of the Grand Jury proceedings. It is the Court's sentiment that much light is shed on an explanation for this eleventh hour renouncement of the co-defendant's Grand Jury testimony in the opinion filed in *Coppedge* v. *United States*, — U. S. App. D. C. —, decided June 23, 1959.

As to the defendant's constitutional contention delineated above, the Court concludes that such a contention is not well founded. The federal courts have held that at a Grand Jury proceeding the Government need only produce *some* evidence which would be competent at trial. (*Holt* v. *United States*, 218 U.S. 245 (1910).) After reading the transcript of the proceedings before the Grand Jury on June 4, 1958 with an eye toward the exclusion of the alleged perjurious testimony of the co-defendant, the Court is satisfied that there was sufficient competent evidence to support the indictment herein challenged. With respect to evidence adduced at these proceedings, there is no constitutional provision which prescribes the kind of evidence upon which the Grand Jury must act. (*Costello* v. *United States*, 350 U.S. 359 (1956).) To hold otherwise, an accused might as a matter of right be entitled to insist upon some form of a preliminary hearing either before or during the Grand Jury proceedings in order to thresh out

whether evidence to be presented to that body is admissible. Obviously, such a procedure would infringe upon the domain of the trial court.

[fol. 51] It should not be necessary to point out that an indictment is not to be considered as evidence of guilt. The basic purpose of the indictment is to furnish the accused with such description of the offense with which he is charged so as to enable him to defend himself properly. (*Young* v. *United States*, 94 U.S. App. D.C. 54 (1954), *cert. den.* 347 U.S. 1015 (1954).) Therefore, and by way of repetition, an indictment is not proof of the offense with which a defendant is accused, but rather it serves the purpose of putting an accused on his guard that he must be prepared to defend himself against the accusation of guilt and the evidence to support that accusation to be introduced against him by the Government at the time of the trial. In the case at bar, certainly the defendant's reversed conviction was not the result of perjurious testimony given by the co-defendant at the trial, because the co-defendant refused to testify there. See *Coppedge* v. *United States, supra.*

For the reasons stated above, the motion to dismiss the indictment is denied.

Order accordingly.

Matthew F. McGuire, United States District Judge.

December 22, 1959.

[fol. 52] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Misc. 1464

[Title omitted]

ANSWER TO MEMORANDUM IN SUPPORT OF PETITION FOR LEAVE TO PROSECUTE AN APPEAL IN FORMA PAUPERIS.—Filed June 16, 1960.

Petitioner, through court-appointed counsel, alleges, *inter alia*, the existence of several rulings on evidence by the trial judge which impinged upon the fairness of the trial. These allegations are based upon information gained by counsel through sources other than the use of a transcript. The transcript of the proceedings have not been prepared by the court reporter. In his memorandum in support of the petition for leave to prosecute an appeal in forma pauperis, counsel requests he be granted a transcript at government expense. Counsel has satisfied the standards of *Whitt* v. *United States*, 104 U.S. App. D.C. 1, 259 F. 2d 158 (1958). It appears the matter of entitlement to an appeal without prepayment of costs can be adequately evaluated only on the basis of a transcript of the proceedings.

Wherefore, it appears appropriate that petitioner be granted forma pauperis relief to the extent of the preparation of a transcript of proceedings, and that counsel be allowed to utilize such transcript to supplement the memorandum in support as he may deem appropriate after the preparation of the transcript.

/s/ Oliver Gash, CUB, United States Attorney. /s/ Carl W. Belcher, Assistant United States Attorney. /s/ Maurice R. Dunie, CUB, Assistant United States Attorney.

[fol. 53] Certificate of Service (Omitted in printing)

[fol. 54] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1464

[Title omitted]

PETITIONER'S REPLY TO GOVERNMENT'S ANSWER—Filed June 17, 1960

The Government's Answer acknowledges that the transcript of the proceedings in this case should be prepared and furnished at the expense of the United States. To that extent the Government and petitioner now find themselves in agreement.

The Government's Answer further suggests that this Court should defer deciding the question of petitioner's right to appeal in forma pauperis until a later date—that is, until after the transcript has been furnished at the expense of the United States and after petitioner's counsel has been "allowed to utilize such transcript to supplement the Memorandum in support as he may deem appropriate after the preparation of the transcript." In this respect there is complete disagreement. The right to prosecute the appeal in forma pauperis should be granted here and now; there is no sufficient ground for deferring such question; and waiting would promote an unwarranted and undesirable inefficiency, discrimination and delay in the administration of criminal justice.

First, as to one group of substantial questions presented by the Memorandum (see pages 4 through 16 thereof)—that is, the questions relating to the validity of the indictment—the substantiality of these questions has been presently shown and is not dependent upon obtaining access to the transcript (although perhaps in some respects the pretrial transcripts will fortify the points raised). The existence of these questions by themselves suffices to estab-[fol. 55] lish petitioner's right to appeal in forma pauperis.

Second, as to the other substantial questions presented in the Memorandum (pages 16 through 29 thereof), even in the absence of a transcript their substantiality is sufficiently evident to support a right of appeal in forma pau-

peris; moreover, the Government's Answer does not undertake to show any respect whatsoever wherein the factual bases set forth in the Memorandum are incorrect.

Third, what the Government is suggesting, in substance, is that after the transcript has been furnished, then petitioner's counsel should prepare and present to this Court another Memorandum in further support of the petition for leave to appeal in forma pauperis; the Government should then have another opportunity to answer such supplemental Memorandum; the matter should then be brought before this Court again on the motions calendar, and orally argued before this Court and determined; and that only thereafter, the case should be briefed on the merits and orally argued on the merits and decided by this Court as an appeal.

If such a wasteful and unnecessarily prolonged procedure were an imposition merely on counsel, then the objections to it might not be worth extensive notice by this Court. But what would also be involved, in the procedure suggested by the Government, is a serious imposition on the time and energies of the Court; a significant delay in the handling of criminal cases on appeal, and an unwarranted enlargement of the elapsed time between the date of sentence and the date of final disposition of the appeal; and a fragmentation of the appellate disposition of informa pauperis cases which will make the appellate process a kind of obstacle course for an indigent defendant which is wholly unlike the situation confronting a defendant who is able to pay his docketing fee in this Court.

[fol. 56] Now that the Government has agreed that Coppedge is entitled to a transcript at the expense of the United States, it is time for the appellate process in this case to be allowed to function with efficiency and dispatch. These are not simply questions of statistical niceties relating to the business of the Court; they go to the substance of the fair administration of criminal justice.

Respectfully submitted, Bennett /s/ Bennett Boskey, 1701 K Street, N.W., Washington 6, D.C., Attorney for Mark Coppedge, Jr., by appointment of this Court.

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[fols. 57-60] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1464

MARK COPPEDGE, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

Before: Wilbur K. Miller, Bazelon and Bastian, Circuit Judges

ORDER ALLOWING PETITIONER TO PROCEED WITHOUT PREPAYMENT OF COSTS, ETC.—July 1, 1960

On consideration of petitioner's petition for leave to prosecute an appeal without prepayment of costs, the memorandum in support, respondent's answer, and petitioner's reply, it is

Ordered by the court that the petition for leave to prosecute appeal without prepayment of costs be held in abeyance, and that petitioner be allowed to proceed without prepayment of costs to the extent of having the trial transcript furnished without costs, it is therefore,

Further Ordered by the court that the stenographic transcript of the trial proceedings in the District Court in this case be furnished to petitioner at the expense of the United States, and that respondent is allowed 10 days from the date on which the court reporter's copy thereof is filed in the District Court within which time to file an opposition to the aforesaid petition.

Per Curiam.

Dated: July 1, 1960.

[fol. 61] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Misc. 1464

[Title omitted]

OPPOSITION TO MEMORANDUM IN SUPPORT OF PETITION FOR LEAVE TO PROSECUTE AN APPEAL IN FORMA PAUPERIS—Filed September 6, 1960.

Comes now the United States by its attorney, the United States Attorney, and opposes the memorandum in support of the petition for leave to prosecute an appeal in forma pauperis.

Facts

Petitioner originally was convicted on ten counts of an indictment filed in the District Court on June 16, 1958. This Court of Appeals reversed the conviction and ordered a new trial. *Coppedge* v. *United States*, 106 U.S. App. D.C. 275, 272 F.2d 504 (1959). At the second trial in March, 1960, petitioner was convicted on eight counts, six counts of forgery (22 D. C. Code § 1401) and two charges of the interstate transportation of falsely made securities (18 U.S. Code § 2314). An application to proceed on appeal without prepayment of costs was denied by the District Court (Holtzoff, J.) on March 22, 1960, with the notation: "I certify that the appeal is frivolous and not taken in good faith. The defendant has had two trials and the jury convicted him both times on the counts on which he was sentenced." Petitioner was notified of the District Court's action.

Thereafter, petitioner *pro se* filed in this Court an application for leave to proceed on appeal without prepayment of costs and a supporting affidavit. This Court appointed Bennett Boskey, Esq., to represent petitioner and [fol. 62] file a memorandum in support of his application.

In the memorandum, petitioner alleges that substantial questions warranting an appeal in forma pauperis exist in three areas—whether the indictment was based on perjured testimony, whether the District Court acted sum-

marily in refusing to disqualify himself and whether petitioner was prejudiced by the use of the prior recorded testimony of a witness not available at the second trial.

Argument

It is respondent's position that none of the questions raised by petitioner are sufficiently substantial to warrant an appeal in forma pauperis.

1. Petitioner filed a motion to dismiss the indictment under Rule 12(b) (2), F.R.Cr.P. The motion was premised on the allegation the indictment was secured as the result of perjured testimony given the grand jury by a co-defendant, Clarence Thompkins, and was supported by a document purporting to be an affidavit. This pretrial motion was denied by the District Court (McGuire, J.) in a memorandum opinion.[1] Judge McGuire read at least part of the grand jury minutes in the case "with an eye toward the exclusion of the alleged perjurious testimony of the co-defendant" and was "satisfied that there was *sufficient competent evidence* to support the indictment herein challenged." (Emphasis supplied.)

In this regard it appears that petitioner recieved more consideration from the District Court than that to which he was entitled. The Supreme Court declared in *Costello v. United States*, 350 U.S. 259, 263 (1956);

> "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required [fol. 63] by the Fifth Amendment. *An indictment returned by a legally constituted grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.*" (Emphasis supplied).

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[1] A copy of the memorandum opinion is atttached to petitioner's memorandum as Exhibit A.

See also *United States* v. *Stein*, 140 F. Supp. 761, 767 (S.D.N.Y. 1956), *reversed on other grounds*, 257 F.2d 830 (2d Cir. 1958); *United States* v. *Labate*, 270 F.2d 122 (3rd Cir. 1959); *United States* v. *Garnes* 258 F.2d 530 (2d Cir. 1958), *cert. denied*, 359 U.S. 937.

Petitioner also contends this Court of Appeals should inspect the grand jury minutes to pass upon the correctness of Judge McGuire's ruling. No such examination is warranted under *Costello* v. *United States*, *supra*. And the cases cited by petitioner for support of this proposition involve situations concerning the impeachment or possible impeachment of prosecution witnesses,[2] a far cry from the instant case.

2. Petitioner complains the District Court (Holtzoff, J.) summarily denied petitioner's motions to disqualify himself on grounds of possible prejudice. The motions were made after the jury had been impaneled and the prosecutor was about to begin his opening statement.

According to petitioner's *pro se* application to this Court of Appeals, Judge Holtzoff said at the hearing January 22, 1960, on the motion to compel production of the grand jury minutes that petitioner had "terrorized" Thompkins and this remark showed the judge was prejudiced against petitioner. The Court did say (Transcript of proceedings of January 22, 1960, p. 4): "I remember the episode very well. He was just terrorized by Coppedge."

Under Title 28 U. S. Code § 144 (1958 ed.), an affidavit of bias or prejudice setting forth the facts and reasons for the belief that such bias or prejudice exists "shall be filed not less than ten days before the beginning of the [fol. 64] term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time." No affidavit was filed and the motion was not made until trial had begun.

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[2] *United States* v. *Spangelet*, 258 F.2d 338 (2d Cir. 1952); *United States* v. *Zborowski*, 271 F.2d 661 (2d Cir. 1959); *United States* v. *McKeever*, 271 F.2d 669 (2d Cir. 1959). The two Supreme Court decisions mentioned, *Palermo* v. *United States*, 360 U.S. 343 (1959) and *Rosenberg* v. *United States*, 360 U.S. 367 (1959), deal with interpretation of the so-called "Jencks Act," 18 U. S. Code § 3500, and do not in any way involve grand jury proceedings.

More important than petitioner's failure to meet or even to try to meet the technical requirements of the statute is the fact that Thompkins was indeed terrorized by petitioner. This Court of Appeals accepted that fact in *Coppedge* v. *United States, supra*, wherein the Court repeated in its opinion the statements made to the District Court by Thompkins' Court-appointed counsel and the prosecutor that Thompkins refused to testify because of fear. *Id.* at 276.

In the same opinion, this Court mentioned the damage done to petitioners' cause in the first trial by the newspaper reports which gave the jury facts to which they were not entitled. This Court said the jury "learned that the witness was in mortal fear of Coppedge, the defendant. They learned that Coppedge was a vicious criminal, already serving a prison term for violence." *Id.* at 279.

3. Petitioner's complaints concerning the use of the prior recorded testimony of a witness, Adam H. Artis, also lack substantiality. Artis testified at the first trial (*Coppedge* v. *United States, supra*, J.A. 57-59, 62-74) but was not available for the second trial, being ill in North Carolina (Tr. 83, 165).[3] The District Court was willing to order the Government to take the deposition of Artis' doctor, but petitioner through counsel accepted the fact Artis was unavailable (Tr. 86-87). Petitioner objected to the reading of the Artis testimony because he possessed a "writing" allegedly signed by Artis which, in effect, retracted his prior testimony.[4] The District Court was inclined to forgo the rules of evidence and permit petitioner to use this statement by Artis until the Court learned the statement was not dated or sworn to (Tr. 85, 91-95).

[fol. 65] It is patent that under Title 14, D. C. Code § 303

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[3] Artis was suffering from leukemia and certain other illnesses including schizophrenia (Tr. 165). An FBI report containing summaries of Artis' hospital records before and after the first trial indicated he did not have any mental illness at the time of the first trial. This report was marked Court Exhibit No. One for Identification and placed in the record (Tr. 384).

[4] A copy of this document is presented in petitioner's instant memorandum as p. 23.

the District Court was correct in permitting the prosecution to read Artis' testimony to the jury in the second trial. Petitioner's counsel was permitted, of course, to read the cross-examination of Artis at the first trial.

The District Court was equally correct in refusing to permit in evidence the alleged retraction by Artis of his prior testimony. The purported retraction was an undated and unsworn to writing, and the Government had no opportunity to cross-examine Artis concerning it.

Not only was the cross-examination of Artis at the first trial read to the jury in the instant case, but petitioner also called as a defense witness Stanley M. Dietz, Esq., who represented petitioner at the first trial. Through Mr. Dietz petitioner was able to attack Artis' credibility.

Richard J. Darragh, Jr., an FBI agent, was called as a rebuttal witness for the prosecution. He testified that he spoke with Artis in Wilson, North Carolina, and Artis gave him a statement. The prosecutor did not question Darragh on direct examination as to what was said by Artis. Obviously, there was no hearsay testimony, although petitioner, who had a copy of Artis' statement to the FBI, cross-examined Mr. Darrah on the material in the document (Tr. 441-442). The statement was not introduced in evidence although marked for identification (Tr. 444).

Petitioner also contends the District Court made certain remarks to the jury concerning Artis' testimony at the first trial but refused to repeat these remarks at the second trial. The statements by the Court at the first trial were gratuitous. He was under no obligation to make them to either jury so long as he instructed properly on the issue of credibility. The jury in the instant case heard Artis' prior testimony and could determine what weight should be given to it in accordance with the Court's instructions on credibility (Tr. 487-488).

In sum, the questions raised by petitioner are not sufficiently substantial for this Court of Appeals to grant an appeal in forma pauperis.

[fol. 66] **Conclusion**

Wherefore, it is respectfully requested the application for leave to proceed on appeal in forma pauperis be denied.

/s/ Oliver Gasch, CWB, United States Attorney. /s/ Carl W. Belcher, Assistant United States Attorney. /s/ Maurice R. Dunie, CWB, Assistant United States Attorney.

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[fols. 67-69] **[File endorsement omitted]**

[fol. 70] **In United States Court of Appeals for the District of Columbia Circuit**

No. Misc. 1464

Mark Coppedge, Jr., Petitioner,

v.

United States of America, Respondent

Petitioner's Reply to Government's Opposition—Filed September 8, 1960

The Memorandum dated June 15, 1960, in support of the petition for leave to appeal in forma pauperis, was prepared at a time when no transcript existed in this case. Subsequently, pursuant to this Court's order dated July 1, 1960, the stenographic transcript was prepared at the expense of the United States and was filed by the reporter. Accordingly, the documents are now at hand for an adjudication of this appeal on its merits, in the same manner as if petitioner were an appellant not indigent. The Government's Opposition, however, nevertheless urges that leave to appeal in forma pauperis should be denied, it being the Government's position (Opposition, p. 2) "that

none of the questions raised by petitioner are sufficiently substantial to warrant an appeal in forma pauperis".

The Government's Opposition in effect constitutes an astonishing and total repudiation of the criteria of "substantiality" as set forth in Supreme Court decisions such as *Johnson Farley, Ellis* and *Cash*, which are cited at page 3 of the Memorandum dated June 15, 1960, in support of this petition. A number of the grounds offered by the Government's Opposition are either legally incorrect, plainly irrelevant, or (however inadvertently) utterly misleading. [fol. 71] The facts shown by the transcript, which now exists, do not detract from the substantiality of the questions previously presented by the Memorandum dated June 15, 1960, in support of this petition; indeed, the transcript heavily underscores the substantiality of the three groups of questions presented in that Memorandum. In addition, the transcript brings to light two new substantial questions —whether corroboration should be required in the District of Columbia to support a conviction based on accomplice testimony; and whether the prosecutor in his summation unfairly vouched for the veracity of the prosecution's witnesses. These two additional substantial questions will be discussed below; such discussion will be preceded, however, by a reply to what the Government's Opposition has to say concerning the three groups of substantial questions presented in the Memorandum dated June 15, 1960.

A. Substantial Questions Relating to the Validity of the Indictment

The Memorandum dated June 15, 1960, (pages 4-16) set forth five substantial questions under this heading. There is nothing in the transcript now available which detracts from the substantiality of any of these five questions in any degree.[1]

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[1] In fact, as to the fifth of them ("Whether in any event the District Court, before determining that the indictment should be upheld, should have made a factual inquiry into whether government agents were responsible for inducing false and perjured testimony by Clarence Thompkins for presentation to the grand jury") the transcript even adds some additional support, since it shows that at the oral

[fol. 72] The Government's Opposition (pages 2-3) argues that this whole group of questions is insubstantial, particularly in view of *Costello* v. *United States*, 350 U.S. 359 (1956). But petitioner's Memorandum dated June 15, 1960 (pages 7-9) has already shown in some detail that *Costello* does not cover the issues raised in the present case; that *Costello* did not involve any issue of false or perjured testimony presented to the grand jury, on which the grand jury relied in returning its indictment; and that, a fortiori, *Costello* certainly did not involve any issue whether government agents were responsible for inducing false and perjured testimony for presentation to the grand jury.

Indeed, if the argument of complete non-reviewability made by the Government's Opposition were to be accepted, it would mean that a federal prosecutor could knowingly and wilfully induce a witness to give false and perjured testimony before a grand jury; that such false and perjured testimony, knowingly and wilfully induced by the prosecutor, could constitute the sole evidence connecting the defendant with the alleged offense and the sole basis for the indictment returned by the grand jury; and yet the indictment would be wholly immune from attack in the courts. Neither *Costello* nor (so far as is known) any other decision has ever held such a far-reaching proposition to be the law; and certainly it is understandable that there would be many who doubt that this would ever become the law. If it is not the settled law—or if there is even a substantial doubt whether it is the settled law—then the group of questions presented by petitioner under this heading are plainly substantial.

After referring to *Costello*, the Government's opposition (page 3) then cites three additional cases, presumably for [fol. 73] the purpose of showing additional support. All three of those cases are entirely wide of the mark.

The first of them is *United States* v. *Stein*, 140 F.Supp. 761, 767 (S.D.N.Y. 1956), reversed on other grounds, 257

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argument of the motion to dismiss the indictment (Transcript of December 11, 1959, page 4) Coppedge's attorney told the Court that he had made available for the Court both Coppedge and Clarence Thompkins, who could be called to testify if necessary.

F.2d 830 (2d Cir. 1958). This case involved a motion by two defendants to have the district court inspect the grand jury minutes and to dismiss the indictment on the ground that no evidence against these two defendants had been presented to the grand jury. The motion was denied by the District Court. The Court of Appeals reversed the conviction and ordered the indictment dismissed on the ground that the evidence was insufficient to sustain the conviction. In doing so the Court of Appeals expressly stated that because of this disposition the other errors alleged were not being considered, 257 F.2d at 831, so that it is not possible to know what view the Second Circuit might have taken on this motion. But more than that, the motion itself as presented in the District Court did not involve any claim (as here) that important testimony which led the grand jury to return the indictment was false and perjured.

Similarly, in the second of the cases cited by the Government's Opposition, *United States* v. *Labate*, 270 F.2d 122 (3rd Cir. 1959), the question raised was whether there had been sufficient evidence before the grand jury to indict the defendants; because no reporter had been present at the grand jury proceedings, it was not possible to determine this by examining a stenographic transcript. The Court of Appeals held that the defendants, because they had not made any suitable motion in the district court to protect their rights, were in no position to complain. No such problem exists in the present case, where adequate [fol. 74] motions were made before trial; and in any event, *Labate* did not involve any claim (as here) that important testimony which led the grand jury to return the indictment was false and prejured.

The third of the cases cited by the Government's Opposition, *United States* v. *Garnes*, 258 F.2d 530 (2d Cir. 1958), certiorari denied, 359 U.S. 937 (1959), is even farther removed from the area of the present controversy. In *Garnes* the defendant complained that her own prior June 14 testimony before the grand jury was "involuntary" and that accordingly the transcript of such testimony should not have been used before the grand jury in obtaining her indictment. The Second Circuit affirmed the conviction on two alternative grounds. It held, first, that her June 14 testimony had in fact been voluntary and hence there

was no objection to using it before the grand jury in obtaining her indictment; and second, that in any event any such objection had been waived because no objection to the indictment had been made, or other step taken to suppress her June 14 testimony, until after her conviction when she made a motion for arrest of judgment.

Accordingly, it is plain that the Government's Opposition has not unearthed any precedents in this Court or in other appellate courts—nor in this District or other district courts either—which establish that the law is, or should be, settled against petitioner on this group of questions. Under these circumstances, and in view of the substantial and important nature of the questions themselves, petitioner is entitled to have them determined by this Court on the merits even though he is indigent.

[fol. 75] B. Substantial Questions Relating to Judge Holtzoff's Summary Denial of Motions that He Should Disqualify Himself

The Memorandum dated June 15, 1960 (pages 16-18) in support of the petition raised the substantial question whether the conviction should be reversed by reason of Judge Holtzoff's summary denial of motions that he should disqualify himself. In this connection the Memorandum set forth that it had been stated to the undersigned that, just before the trial began, two oral motions were made to Judge Holtzoff that he should disqualify himself and allow the defendant to be tried before some other judge; that Judge Holtzoff had summarily denied the motions without affording any opportunity whatsoever to the defendant or his counsel to state to Judge Holtzoff the substantive grounds on which the motions were based; and that Coppedge in his *pro se* application to this Court had stated that the ground for asking Judge Holtzoff to disqualify himself was that in a hearing on a preliminary motion on January 22, 1960, shortly before this trial, "Judge Holtzoff made the uncalled for, un-proven, and highly prejudicial remarks, that petitioner had terrorized a former government witness. Since such a charge has never been placed against, or proven against petitioner, the remarks by Judge Holtzoff show that he was prejudiced against petitioner even before the trial."

The Memorandum in support of the petition, having been prepared without benefit of the transcript, made clear that final evaluation of this point must await the existence of a transcript. The transcript which now has been made available fully substantiates the point and shows the [fol. 76] question to be one of great substance. Indeed, the error here committed by the trial court, as now shown by the transcript, is of sufficient magnitude to warrant a summary reversal of the conviction.

The transcript of oral argument on January 22, 1960 (page 4), shows that the following occurred during the argument before Judge Holtzoff of petitioner's pre-trial motion for permission to the defense counsel to inspect the grand jury transcript [underscoring added]:

> "Mr. Cohen [counsel for Coppedge]: Very briefly, the motion was based on perjurious implicating testimony, the evidence of the perjurious implicating testimony being letters written to the Court, of which I have purported copies and signed statements to this effect: The perjurer was a person named Clarence Thompkins. Your Honor may remember him from having the trial in your Court—he was the gentleman who refused, I believe, to even take the stand in the matter.
>
> "The Court [Judge Holtzoff]: I remember the episode very well. He was just terrorized by Coppedge.
>
> "Mr. Cohen: If Your Honor please, I am not alleging this; I am stating that this Thompkins, on signed statements, he asserts that he perjured himself.
>
> "The Court: He asserts—I imagine that statement was induced by Coppedge. In any event, you cannot try cases twice or in bits. If the testimony was perjured, the jury will so find. We cannot first determine whether the Government's testimony is perjured and then try the case."

With this as the background of what the transcript actually does show concerning Judge Holtzoff's manifestation of hostility toward the defendant Coppedge before this trial began, it is now appropriate to turn to what the transcript shows concerning the efforts of the defense to persuade Judge Holtzoff to disqualify himself so the case might

be tried before another judge. At the beginning of this trial, just after the jury had been empaneled, Coppedge's trial counsel made an unsuccessful effort to have Judge Holtsoff withdraw from the case, as follows (Tr. 12-13):

> [fol. 77] "Mr. Cohen: . . . May I ask Your Honor, and I ask most respectfully and at the request of my client, Mr. Coppedge, whether or not your Honor might consider withdrawing from the case?
>
> "The Court: From what?
>
> "Mr. Cohen: Withdrawing from the case.
>
> "The Court: No, because the case was sent to me to try in the ordinary course of events. I don't think I have a choice in the matter. Those things are not voluntary. It is unethical for a Judge to decline to try a case because it is unpleasant and impose an extra burden on some other Judge. No Judge should ever disqualify himself unless he is legally disqualified."

Shortly afterwards, upon completion of the opening statements of counsel but before the taking of testimony had begun, Coppedge's trial counsel made a second unsuccessful effort to persuade Judge Holtzoff to disqualify himself, as follows (Tr. 23-24):

> "Mr. Cohen: If Your Honor please, we took the liberty of suggesting to the Marshal to hold the jury off while I address myself to the point we discussed briefly at the bench. I wanted to do this in the presence of the defendant. As Your Honor knows, I was assigned—
>
> "The Court: I don't care whether you are assigned or retained, because your authority is the same, and your duty is the same in either event.
>
> "Mr. Cohen: I appreciate that my duty would be equal—
>
> "The Court: Your duty would be equal, and the limitations are the same.
>
> Mr. Cohen: Yes, Your Honor. At a time most recent, I don't remember the date—it might show on the jacket—a motion came up before Your Honor in the case attacking the indictment. What I am addressing myself to is the problem as to whether or not, at the

request of the defendant, the Court might not sit upon this matter.

"The Court: You have already brought that up at the bench conference, and I have disposed of the matter. You may not bring it up again.

"You may proceed.

"Mr. Cohen: For the record, if I may give the reasons—

"The Court: No, you may not. I don't know what you mean when you say, 'for the record.' Cases are tried before the Court and a jury; they are not tried 'for the record.'

"You may resume your seat, sir."

[fol 78] The Government's Opposition (pages 3-4) offers two grounds for disagreeing with petitioner's position on this question. Both of the Government's ground are demonstrably devoid of merit; and in any event, neither one of them detracts in the slightest from the substantiality of the question presented in this appeal.

First, the Government's Opposition objects that the question was not raised by the filing of a statutory affiravit of prejudice under 28 U.S.C. §144. But this circumstance has already been adverted to in the Memorandum dated June 15, 1960 (pages 17-18)[2] in support of the petition, where a number of cases (some of them arising in this jurisdiction) were cited to show that the filing of a statutory affidavit of prejudice under 28 U.S.C. §144 is by no means the only proper way, under all circumstances, for a question as to disqualification for prejudice to be given consideration. The Government's Opposition does not even seek to distinguish any of those cases, nor to challenge their continuing vitality or their applicability to the situation presented by the record in the present case.

Second, and what it claims to be "more important," the Government's Opposition relies upon what it states to be "the fact that Thompkins was indeed terrorized by petitioner." For this asserted fact the Government's Oppo-

[2] The Memorandum contains a typographical error, referring to 28 U.S.C. §114, instead of 28 U.S.C. §144 which is the correct citation.

sition relies on statements made by this Court in its opinion on Coppedge's appeal from the first conviction, 106 App.D.C. 275, 276, 279, 272 F.2d 504, 505, 508. But it is entirely clear that on the first appeal this Court was not making any determination whatsoever as to whether in [fol. 79] fact Coppedge had or had not terrorized Thompkins; this Court held that Coppedge's right to a fair trial had been prejudiced by lurid newspaper accounts of an episode which easily might have led the jury to draw such a conclusion. In fact, no testimony was ever taken from either Coppedge or Clarence Thompkins as to whether any such terrorization had actually occurred. Whatever impression Judge Holtzoff may have had, or whatever Judge Holtzoff believed concerning whether any such terrorization had occurred, was based on what persons other than Coppedge and Clarence Thompkins had stated; and as already noted in the Memorandum dated June 15, 1960 (page 17 and page 6, footnote 2), after the supposed event and prior to imposition of sentence on Coppedge at the first trial, Clarence Thompkins had expressly written to Judge Holtzoff that:

> "On December 10-58 I was brought into Your Honor's court to testify falsely, which I refused to do so, and was found guilty of criminal contempts of court. It was told to Your Honor, by attorney Letterman and Mr. Flannery that I was in fear of one of the defendant in the case, which is not true at all."

Essentially the Government Opposition's legal position appears to be that there is no unfairness in compelling a defendant to come to trial before a manifestly hostile or prejudiced judge, provided that the hostility or the prejudice have sufficient factual foundation. Such cannot be the law in the federal courts generally, and certainly should not be allowed to become the law in the District of Columbia, where the availability of a substantial number of trial judges makes the problem of recusation less difficult than it may be in a district where there is customarily only a single federal judge. But in any event, as has been shown, no actual court inquiry or court determination has ever been made which would establish that Coppedge had in fact terrorized Clarence Thompkins.

[fol. 80] Hence it could not be said that the hostility manifested here was sufficiently founded on fact to warrant overlooking its disruptive influence on the fair and proper administration of justice.

In the federal courts no defendant should be compelled to go to trial before a judge who, before the trial has begun, has manifested "a definite and positive hostility" to the defendant and his case. *Whitaker* v. *McLean*, 53 App.D.C. 259, 118 F.2d 596 (1941). Here, as already shown (page 7, supra), Judge Holtzoff in open court had flatly declared that the defendant Coppedge had terrorized the witness Clarence Thompkins, and also that, as to Thompkins' recantation, "I imagine that statement was induced by Coppedge." Under these circumstances, having displayed such a firm degree of feeling against the defendant and against the evidence which the defense might seek to adduce at the trial, the judge should not have proceeded to preside at the trial of the case.

In any particular case it may be somewhat difficult to say with certainty in exactly what respects the existence of hostility at the outset on the part of the judge might have affected the conduct of the trial and its outcome. In many ways, both obvious and subtle, it may work to the severe prejudice of a defendant, no matter how conscientiously the judge strives to avert this. Areas where it may be particularly important are in connection with those actions of the trial judge which rest especially within the realm of judicial discretion—such as certain types of rulings on evidence, or the judge's comment or refusal to comment to the jury on the testimony, or, particularly, the length of sentence imposed. Moreover, a defendant may well be more reluctant to take the stand to testify, if there has been a clear manifestation before the trial [fol. 81] begins that the judge is hostile to the defendant or the defendant's case.

In any event, these are intangibles which a fair administration of the criminal law should make it wholly unnecessary to explore. The remedy is not to make an almost impossible effort, after the trial, to weigh just how much the defendant has actually suffered from a judge's predisposition of hostility. Rather, the remedy is to prevent the question from arising at all by transferring the case

to another judge for trial. This could very easily have been achieved in the present case if Judge Holtzoff had recused himself and requested that another judge be assigned to try the case.

In this case the degree of hostility manifested by the judge before the trial plainly surpassed acceptable bounds. It would have been most appropriate if the judge himself had recognized this and had on his own motion transferred the case to another judge. Failing this, the judge should have done so in response to the two oral motions which defense counsel addressed to that issue.

As was stated in the Memorandum dated June 16, 1960 (page 18) in support of the petition, it is basic to our legal system that it must not only do justice but must also "satisfy the appearance of justice". *Offutt* v. *United States*, 348 U.S. 11, 14 (1954); *Levine* v. *United States*, 362 U.S. 610, 616 (1960). The present trial has failed in both respects. On this ground alone, the conviction should be summarily reversed by this Court.

C. Substantial Questions as to Prejudice Resulting From Prosecution's Use of Testimony Given at First Trial by the Co-defendant Artis.

The Memorandum dated June 15, 1960 (pages 19-29) set forth four substantial questions under this heading. The Memorandum made clear that a more definitive assess-
[fol. 82] ment of these questions must await the existence of a transcript.

In one important respect the transcript has shown the circumstances to be different from what was tentatively set forth in the Memorandum dated June 15, 1960; this is in connection with whether the non-availability of Artis was sufficiently shown at the trial. As the Government's Opposition (page 4) states, the transcript does show that the trial court was willing to order the Government to require taking the deposition of Artis' doctor concerning Artis' unavailability, but, upon inquiry from the Court, petitioner through his trial counsel accepted the fact that Artis was unavailable (Tr. 86-87, 95).

With this exception, however, the transcript has confirmed the substantiality of this group of questions as set forth in the Memorandum dated June 15, 1960.

Thus the transcript shows that Judge Holtzoff, having initially said that he would admit into evidence the recantation signed by Artis subsequent to the first trial (Tr. 85, 87, 91) and having suggested that the statement be turned over to the FBI for appropriate comparison of Artis' handwriting (Tr. 86, 88-89), then changed his mind and ruled that the statement should be entirely excluded. This the Judge stated was because only the signature was in Artis' handwriting and the statement was not dated or sworn to, and the Judge recognized the handwriting of the body of the statement as being —as indeed it must almost certainly have been—"the handwriting of some gentleman who is an inmate of the penitentiary because I have received papers from other prisoners in this handwriting" (Tr. 91-95). From the standpoint of the admissibility of this important evidence which would have gravely impeached the Artis testimony, no explanation was suggested why it is any the more ques-[fol.83] tionable for a prisoner to employ a fellow prisoner as an amanuensis (which is often a practical necessity), than it would be for him to use a typewriter. Accordingly, the substantiality of the question as to improper exclusion of the proffered Artis recantation remains as stated in the Memorandum dated June 15, 1960 (pages 21-26).[3]

Similarly, the transcript confirms that Judge Holtzoff did fail and refuse to inform the jury of the deficiencies

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[3] Furthermore, the defense called as a witness one Robert L. Bush (Tr. 404) who testified that he had been a cell mate of Artis and Coppedge at Lorton Reformatory for ten days in February 1958, and that he had overheard conversations between Artis and Coppedge dealing with the charges involved in this case (Tr. 405-406). Upon the prosecution's objection (Tr. 406), Judge Holtzoff refused to permit Bush to testify to anything Artis had said or any contradictory admissions Artis had made, "because he [Artis] has not been confronted with that statement —with anything that he said to this witness" (Tr. 406-407). Thus in this respect also, the unavailability of Artis at this second trial was unfairly used to cut off defense evidence intended to contradict the Artis prior testimony which was read to the jury at this second trial.

and weaknesses he himself had noted in Artis' testimony at the first trial. The Judge's refusal, moreover, followed an explicit request by defendant's trial counsel (Tr. 412-413). The substantiality of the question, in the unusual circumstances of this case, accordingly remains as set forth in the Memorandum dated June 15, 1960 (pages 26-27).

The transcript likewise confirms that, contrary to the Jencks Act, the prosecution failed to furnish to defense counsel the original of the statement made by Artis to the FBI in Wilson County jail, North Carolina, on December 2, 1958, just after Artis was arrested. The record shows a request for this was duly made by defense counsel when the reading of the testimony given by Artis at the [fol. 84] first trial was completed at this trial (Tr. 233-234); that several later requests for the original were likewise made during the rebuttal testimony of FBI Agent Darragh,[4] (Tr. 439-441, 443, 444, 448). Yet the original of the statement was never produced, the testimony being that it was "en route" from the Charlotte office of the FBI to Washington (Tr. 439, 447), although what was said to be a typed copy of it was produced (Tr. 444-447); and the trial judge refused to hold the trial open until the original statement arrived (Tr. 441, 443, 444). Moreover, since FBI Agent Darragh testified that the original of this statement was in Darragh's own handwriting and was signed by Artis (Tr. 437, 438, 439), the original of the statement, which admittedly the Government had available, was required under the Jencks Act to be produced at the trial not only as a statement of the witness Artis, but also as a report of the witness Darragh; and the prosecution's failure to produce the original was a non-fulfillment of its statutory obligations under the Jencks Act.

The Government's Opposition also argues (page 5) that "no hearsay testimony" was introduced through FBI Agent Darragh because "the prosecutor did not question Darragh on direct examination as to what was said by Artis". But the transcript shows that on redirect

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[4] The Memorandum dated June 15, 1960 (page 27) refers to him as FBI Agent Darlington, but the record shows his name to be Darragh (Tr. 435).

examination the following damaging inadmissible hearsay testimony was elicited from Darragh by the prosecutor, over defense counsel's objection (Tr. 445):

> "Q. (By Mr. Flannery) To whom did he (Artis) say he gave the money?
>
> "A. He referred to a gentleman by the name of Mark (Coppedge) as having received the change.
>
> [fol. 85] "Q. Mark.—Had you ever heard that name before that day?
>
> "A. Not prior to my talking with Mr. Artis, no."

Moreover, the prosecutor in his summation to the jury strongly emphasized this item of inadmissible hearsay evidence (Tr. 456, 477-478).

On the whole record the various objections previously made to the use of the Artis testimony and to the circumstances surrounding its use, are shown to be well founded, with the exception already noted (page 13, supra). The main argument to the contrary in the Government's Opposition (page 5) seems to be an assertion that "It is patent that under Title 14, D.C. Code § 303 the District Court was correct in permitting the prosecution to read Artis' testimony to the jury in the second trial". This argument is entirely misdirected, for the statute provides no support for the Government's position.

The statute cited, § 14-303, reads as follows:

> "§ 14-303 [9:10] Testimony of deceased or insane party.
>
> "If a party, after having testified at a time when he was competent to do so, shall die or become insane or otherwise incapable of testifying, his testimony may be given in evidence in any trial or hearing in relation to the same subject-matter between the same parties or their legal representatives, as the case may be; and in such case the opposite party may testify in opposition thereto. (Mar. 3, 1901, 31 Stat. 1357, ch. 854, § 1065; June 30, 1902, 32 Stat. 540, ch. 1329)."

First, it is extremely doubtful that this section has any application whatsoever to criminal proceedings, rather than to civil proceedings alone. D. C. Code § 14-303 is, it will be noted, an appendage to the preceding section,

§ 14-302, which states the so-called "surviving party rule," applicable "in any civil action" against any person incapable of testifying or his representative; and since § 14-303 provides an exception to the rule stated in [fol. 86] § 14-302, presumably the scope of § 14-303 is to provide the exception likewise "in any civil proceeding".[5] Second, § 14-303 applies to "any party" to the action who is unavailable as a witness at the trial in which he is a party; and at Coppedge's criminal trial it would seem clear that Artis was merely a witness and not also a "party" within the meaning of the statute. Third, it will also be noted that in any event the statute contemplates that where prior testimony of an unavailable witness is used, there shall be broad opportunity for rebuttal—an opportunity which the actions of the trial judge here foreclosed.

At the outset of this Reply it was stated that the transcript not only underscores the substantiality of the three groups of questions presented in the Memorandum dated June 15, 1960, but that it also brings to light two new substantial questions. These two additional substantial questions will now be discussed.

D. Substantial Question Relating to Whether Corroboration Should be Required in the District of Columbia to Support a Conviction Based on Accomplice Testimony.

The transcript shows that the trial judge charged that the jury might convict the defendant solely on the basis of uncorroborated accomplice testimony. Specifically, the trial judge charged (Tr. 489):

> "The testimony of an accomplice must be received with care and scrutinized with caution. I do not mean by that that the accomplice may not be believed. You have a right to believe the testimony of an accomplice; [fol. 87] but before deciding whether or not to believe him, you must scrutinize his testimony with care and caution. In fact, the law permits the jury to convict a person on the sole and uncorroborated testimony of

[5] Moreover, § 14-305, which states a rule of evidence intended to apply to both civil and criminal proceedings, expressly states "in either civil or criminal proceedings".

an accomplice if the jury decides to believe the accomplice."

Thus under the judge's instructions it was not necessary for the jury to find any credible corroboration if the jury chose to believe the accomplice testimony.

The correctness of this charge raises a substantial and important question for review by this Court. It is true that such a charge is in accord with several prior decisions of this Court—namely, *Egan* v. *United States*, 52 App. D.C. 384, 287 Fed. 958 (1923); *McQuaid* v. *United States*, 91 App. D.C. 229, 198 F.2d 987 (1952); *Bishop* v. *United States*, 100 App. D.C. 88, 243 F.2d 32 (1957). However, the decisions referred to are deserving of the most careful reconsideration by this Court at this time, in the light of recent developments in the law.

The question whether accomplice testimony must be supported by some corroboration connecting the defendant with the offense has had a long and complex history in common law jurisdictions. Over a period of several hundred years the law's development on this subject has been generally in the direction of more rigorous standards; and in nearly half the States of the Union there are statutes which affirmatively prevent the trial judge from sending a criminal case to the jury on the basis of an accomplice's testimony unless some corroborative evidence connecting the defendant with the crime has been adduced. 7 Wigmore, Evidence § 2056; see, e.g., *People* v. *Wallin*, 32 Cal. 2d 803, 808-809; 197 P.2d 734, 737 (1948); *State* v. *McLaughlin*, 250 Minn. 309, 84 N.W.2d 664 (1957); *People* v. *Malizia*, 4 N.Y.2d 22, 148 N.E.2d 897 (1958); *Goodwin* v. *State*, 307 S.W.2d 264 (Tex.Cr.App. 1957); *Ing* v. *United States*, 9th [fol. 88] Cir., decided May 12, 1960 (for Alaska). The same rule prevails in some other States—including our neighboring State of Maryland—without the aid of statutory command. *Watson* v. *State*, 208 Md. 210, 217, 117 A.2d 549, 552 (1955); *Witham* v. *State*, 191 Tenn. 115, 122, 232 S.W.2d 3, 6 (1950). The policy reflected in those common law jurisdictions where corroboration is required, whether by statute or decision or both, is based on extensive experience as to possible dangers and unreliability of accomplice testimony, and on the need to insist, in the interests of fairness,

upon the safeguard of some corroboration connecting the defendant with the offense.

The District of Columbia decisions referred to, like a number of decisions in the Courts of Appeals of other circuits, have held that in criminal trials in the federal courts corroboration is not required for accomplice testimony. But all such decisions constitute somewhat attenuated extrapolations from two opinions of the Supreme Court, *Holmgren* v. *United States*, 217 U.S. 509, 523-524 (1910), and *Caminetti* v. *United States*, 242 U.S. 470 495 (1917). In *Holmgren* the ground of decision was that a requested charge was incorrect because it improperly assumed the witness to be clearly an accomplice; the Supreme Court went on to say: "It is undoubtedly the better practice for the courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them". In *Caminetti*, the Supreme Court repeated what was said in *Holmgren* and then added: "While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them.. 1 Bishop, Crim.Proc. 2d ed. § 1081, and cases cited in the note." It should be noted, moreover, that in *Caminetti* the conviction at least was supported by the testimony of two accomplices, rather than of one alone.

[fol. 89] It seems fitting that the law of this subject to be applied in the District of Columbia should now be reexamined by this Court from the standpoint of "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience". Rule 26, Federal Rules of Criminal Procedure; *Hawkins* v. *United States*, 358 U.S. 74 (1958). The problem is an important and recurring one in the trial of criminal cases in the District of Columbia. The prior decisions of this Court—which it is urged should now be qualified or overruled—have carried the non-corroboration doctrine to extreme lengths, and without even the safeguards which must have been contemplated by *Holmgren* and *Caminetti*. Some of those safeguards were preserved in this Court's decision in *Freed* v. *United States*, 49 App. D.C. 392, 266 Fed. 1012 (1920), but have been lost sight of in its subsequent decisions.

Holmgren and *Caminetti* establish that during the past

fifty years the Supreme Court's doctrine has been that it is "the better practice" to instruct the jury to require corroboration before giving credence to the testimony of an accomplice. It is difficult to understand why this Court and other lower federal courts have felt so free to depart from and to ignore such "better practice". Nor is it readily apparent why "better practice" should not equally require an acquittal if the accomplice's testimony is supported by no corroboration whatsoever connecting the defendant with the offense. A reexamination of the matter is called for, and is certainly appropriate under the evolutionary principles embodied in Rule 26 of the Federal Rules of Criminal Procedure.

A number of additional reasons make this a most suitable occasion for such reconsideration of the law to be ap-
[fol. 90] plied in the District of Columbia. The problem as to accomplice testimony frequently arises in conspiracy cases; and the great expansion in the federal law of conspiracy—"that elastic, sprawling and pervasive offense" (concurring opinion of Mr. Justice Jackson in *Krulewitch* v. *United States*, 336 U.S. 440, 445 (1949))—necessitates a thoughtful reassessment of the safeguards which in the light of modern conditions are necessary and desirable to forestall serious miscarriages of justice. Moreover, apart from the special problems arising in conspiracy cases, in recent years the Supreme Court has given renewed and enlarged recognition to a requirement of corroboration in various situations, *Weiler* v. *United States*, 323 U.S. 606 (1945) (perjury prosecutions); *Opper* v. *United States*, 348 U.S. 84 (1954) (extrajudicial admissions of a defendant); *Smith* v. *United States*, 348 U.S. 147, 151-159 (1954) (admissions of elements of offense which involves no tangible corpus delicti), where the danger of injustice appears to be no greater, and perhaps is less, than in situations where conviction might otherwise rest solely on accomplice testimony. This Court too has recently enlarged the scope of the corroboration requirement in situations where required in the interests of justice. *Kelly* v. *United States*, 90 App. D.C. 125, 194 F.2d 150 (1952); *Wilson* v. *United States*, 271 F.2d 492 (1959). The principles as to accomplice testimony should be considered anew in the light of such developments.

It is true that at the trial in the present case no specific

objection was made to the accomplice charge as given by the trial judge. However, it must be perfectly clear, that, in view of the prior decisions of this Court, any such objection would have been totally unavailing and would not have resulted in the slightest modification in the charge [fol. 91] which the trial judge gave. Thus the absence of an objection could in no way have lulled the trial judge into allowing error to go uncorrected. It is not to the District Court but to this Court that one must look for appropriate reconsideration of the doctrine at issue. Under the circumstances, and in view of the large public importance of the question in the District of Columbia, it is singularly fitting that the doctrine be reconsidered in this case.

E. Substantial Question Relating to Whether the Prosecutor Unfairly Vouched for Veracity of Government Witnesses.

As a practical matter the outcome of this trial turned largely on questions of credibility—whether the jury would believe, and beyond a reasonable doubt, the witnesses presented by the prosecution, even though their testimony was in many respects contradicted or shaken. Despite this circumstance the prosecutor's summation to the jury unfairly vouched for the truthfulness of the Government's witnesses in a manner which seriously prejudiced the fair consideration of the case by the jury.

Thus with respect to the testimony of two of his important witnesses, Quincy McCall and Hattie McCall, the prosecutor said (Tr. 451-452) (Emphasis added):

> "Then there is another aspect of this case which I think is most important, ladies and gentlemen, it bears your serious consideration: There is not a shred of testimony in this case from anyone that there was any reason why Quincy McCall or Hattie McCall or any other witness should lie about Coppedge's participation in this case. The testimony is to the contrary. As I recall, the only testimony relative to the type of relationship between Coppedge and the McCalls was this: They were friends. Now, that is important. Is there one shred of testimony that there was any animosity between Coppedge and the McCalls? Why, out

of all the people in the District of Columbia who had some connection, one way or the other, in this case, would the McCalls pick Coppedge, and say that he is the prime mover in this case; he is the one who had the trunk sent there; he is the one who came [fol. 92] there with the kay and opened the trunk? Why would they say that? *There is only one obvious answer, so far as the Government is concerned, and I think that I am justified in saying that on the basis of the evidence—the only reason that they said it is because it is the truth.*"

And again, with respect to the testimony of the Government's unavailable witness Artis, as sought to be buttressed by the testimony of FBI Agent Darragh, the prosecutor said (Tr. 455-457) (Emphasis added):

> Now, again, I say this is very significant: Agent Darragh didn't know anything about the facts in this case. He had merely received a request to have this man arrested, Artis arrested. Artis was arrested, and there came a time when Artis was in the jail in North Carolina, and Agent Darragh went over to talk to him. Now, there has been the suggestion, through the testimony in this case—certainly, I got the impression from Mr. Dietz's testimony—that when Artis was questioned in North Carolina, that words were put in his mouth, promises were made to him, and that he was induced, more or less, to involve Mark Coppedge in this case. But you heard from the testimony of Agent Darragh that he didn't know anything about this case. He didn't even know who Mark or Mark Coppedge was. You heard that he talked to this witness, Adam Artis, and Adam Artis volunteered to tell him, after being advised of his rights, what he knew about the case, and the agent wrote it down as Artis told it to him. Now, why—here, again, is one of those strange little coincidents in this case—why is it that in that statement that Artis gave to the F.B.I. agent as he wrote it down, why is it that the name Mark came into the case—Mark Coppedge? Why is it that Adam Artis; the poor unfortunate Adam Artis, who was used as a dupe in this case by this very clever fellow,

> why is it that Adam Artis told the F.B.I. agent that he was in the car, "I went to the liquor store from the car, and I came out." "Who did you give the money to?" "Mark." *Now, there is a statement being taken by a completely disinterested F.B.I. agent who knew nothing about the case, nothing at all, and he tells you that Artis made the statement to him—doesn't that show you, ladies and gentlemen, that Artis is telling the truth in this case, and Alexander is not? Do you think that the F.B.I. agent got on the witness stand and deliberately perjured himself in this case? I think not, ladies and gentlemen. I point those things out to you for your serious consideration.*

And again, in disparagement of defense witnesses and in support of testimony adduced by the prosecution from FBI witnesses, the prosecutor said (Tr. 460-461) (Emphasis added):

> "But Allen Alexander testified further, too. He testified that it was all his fault as far as the money [fol. 93] order was concerned. I have discussed that previously. That he sent Artis in there, and that he got the money. Well, as I say, I have discussed that aspect of this case, but he said further that he had talked to the F.B.I., and, I believe he was the one—maybe it was Tyler—anyway, one of these people said that the F.B.I. had said, "Well, now, look, you plead guilty in this case, you testify, and we'll be standing in your corner." *Well, we know from the testimony of the F.B.I. that that just didn't happen, ladies and gentlemen, didn't happen in this case.*
>
> "Allen Alexander testified also that he told the F.B.I. that he had won two of these money orders in a crap game; said that he told that to the F.B.I. *However, when the agent from the Federal Bureau of Investigation was questioned in that regard, he denied that Allen Alexander had told him that at all. We know that neither Alexander nor Tyler made any statement."*

Having said these things, the prosecutor then closed his summation by stating (Tr. 462):

> **"The Government feels that the evidence in this case, as I said earlier, shows that this fellow Coppedge is a rather clever type of a criminal, clever enough to remain in the background and send in weaklings and dupes to do his dirty work. That is a fair statement, based on the testimony, and you have a duty, I submit, in this case to find this person guilty."**

The standards applicable in the federal courts to prosecutors' summations have recently been considered at length by the Court of Appeals for the First Circuit in *Greenberg v. United States*, decided July 12, 1960. There the First Circuit held that a conviction was invalidated because the prosecutor had opened his summation by stating that he is a "sort of thirteenth juror" who uses his training to evaluate evidence, and then had closed his summation by stating his opinion that the defendant was guilty. The First Circuit's opinion, by Judge Aldrich, includes the following:

> "Rule 15 of the Canons of Professional Ethics of the American Bar Association reads, 'It is improper for a lawyer to assert in his argument his personal belief in his client's innocence or in the justice of his cause.' Government counsel stated in oral argument before us that this was 'inapposite' because he is an 'advocate.' We are not clear whether he disapproves of the principle, or whether he considers himself outside of it. In either event we disagree. To permit [fol. 94] counsel to express his personal belief in the testimony (even if not phrased so to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them has the advantage of official backing. The resolution of questions of credibility of testimony is for impartial jurors and judges. The fact that government counsel is, as he

says, an advocate is the very reason why he should not impinge upon this quasi-judicial function. We believe the canon to be elemental and fundamental. See also 1 Bishop, New Criminal Procedure Sec. 293 (2d ed. 1913); 6 Wigmore, Evidence Sec. 1806 (3d ed. 1940).

"It is true that special circumstances, such as a personal attack on counsel, may occasionally justify a reply. See, e.g., United States v. Socony-Vacuum Oil Co., Inc., 1940, 310 U.S. 150, 240-42; Gridley v. United States, 6 Cir., 1930, 44 F.2d 716, 739; United States v. Battiato, 7 Cir., 1953, 204 F.2d 717, 719. Too much has sometimes been read into these cases due in part, perhaps, to language in some of the opinions. To the extent that cases may be found that permit counsel to state their personal belief as a matter of course, we do not follow them. We agree with the statement that 'No one who is at all conversant with jury trials can fail to see the possible prejudice * * *' State v. Gunderson, 1913, 26 N.D. 294, 297, 144 N.W. 659, 660."

In the light of the foregoing criteria there is a plainly substantial question whether the prosecutor's summation in the present case exceeded permissible bounds and caused serious unfair prejudice to the defendant.

While no express objection to the summary was made at the time, the error is of a sufficiently fundamental nature —when considered alone, and even more especially when considered together with other features of the trial which have been discussed—to warrant this Court in noticing it as "plain error" under Rule 52(b) of the Federal Rules of Criminal Procedure. Compare *Surratt* v. *United States*, 269 F.2d 240, 241 (App. D.C. 1959). The unfairness, having a most flagrant and prejudicial character, originated with the prosecution; it occurred at the end of the trial, when all the evidence had been taken and the case was [fol. 95] being put before the jury; and in any event, once the damage had been done, it is hardly possible that effective corrective action could have been taken by the trial court.

Conclusion

For the reasons which have been set forth in the Memorandum dated June 15, 1960, on behalf of petitioner, and in this Reply, this criminal case presents an abundance of substantial questions deserving consideration on the merits in this direct appeal from the judgment of conviction. The questions involved, indeed, are far more substantial than those which are involved in many other criminal appeals by non-indigent defendants, which every month this Court reviews on the merits as a matter of regular course. The questions are not made any the less substantial because the Government may on the merits happen to disagree with the positions being taken by petitioner. This appeal should be reviewed on the merits by this Court to the same extent that it would be reviewed if petitioner were not indigent. Accordingly, the motion for leave to appeal in forma pauperis should be granted.

In addition, for the reasons set forth in this Reply (pages 6-13, supra), because of Judge Holtzoff's failure and refusal to recuse himself in the case, the judgment of conviction should be summarily reversed by this Court.

Respectfully submitted,

(s) Bennett Boskey, 1701 K Street, N.W., Washington 6, D. C. Attorney for Mark Coppedge, Jr., by appointment of this Court

September 8, 1960

Certificate of Service (omitted in printing)

[fols. 96-98] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1464

MARK COPPEDGE, JR., Petitioner

v.

UNITED STATES OF AMERICA, Respondent

Before: Wilbur K. Miller, Chief Judge, Bazelon and Bastian, Circuit Judges, in Chambers

ORDER DENYING PETITION FOR LEAVE TO PROSECUTE AN APPEAL IN FORMA PAUPERIS—November 4, 1960

Upon consideration of the petition for leave to prosecute an appeal in forma pauperis and of the memoranda in support and in opposition, it is

Ordered by the court that the petition for leave to prosecute an appeal in forma pauperis is denied.

Per Curiam.

Dated: November 4, 1960

Circuit Judge Bazelon would grant the petition.

[fol. 99] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 1a-2a] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal Action No. 579-58

UNITED STATES OF AMERICA,

v.

MARK COPPEDGE, JR., Defendant

Washington, D. C.

Transcript of Proceedings—December 11, 1959

The above-entitled cause came on for hearing before The Honorable Matthew F. McGuire, United States District Judge, at 11:40 a.m.

APPEARANCES:

Sidney A. Cohen, Esq., For the Defendant.
Thomas A. Flannery, Esq., Asst. U. S. Attorney, For the Government.

[fol. 3a] PROCEEDINGS

The Deputy Clerk: Case of Mark Coppedge.
The Court: Very well. We shall proceed.

ARGUMENT FOR THE DEFENDANT

Mr. Cohen: If Your Honor please, in the Coppedge case, my name is Sidney A. Cohen, appointed to defend Mr. Coppedge.

There is a motion before Your Honor to strike the indictment. It is based on our allegation, which we think we have substantial proof of, that perjured testimony implicating Mr. Coppedge was presented to the Grand Jury——

That such perjured implicating testimony would necessarily taint the entire proceedings and also vitiate the force and effect of the indictment issued thereunder.

We have two elements to consider: the factual predicate, what proof the defendant can adduce to Your Honor, to show that perjury was committed implicating him; and then, assuming this, we have the legal issue, of whether or not,

if there was such perjured testimony, it is legally sufficient as grounds for dismissal of the indictment.

I have filed in support of my motion an affidavit. It is termed an affidavit with acknowledgment from one Clarence Thompkins. It is filed as exhibit No. 1.

I have also filed in the record with the motion as Exhibit No. 2, a copy of a letter which from its substance I assume was directed to Judge Holtzoff, of Your Honor's Court, and which I found in the file of the attorney who had pre-[fol. 4a] viously tried the case.

We have two other exhibits, 3 and 4, which are not signed, but which contain the same substance and subject matter.

I have made available for the Court this morning, though I do not intend, unless it be necessary, to call upon them for testimony, the defendant, Mr. Coppedge, who is with us here, and also Mr. Clarence Thompkins, who is the affiant and who is the person whom we allege implicated Mr. Coppedge improperly.

I am prone, Your Honor, to rest upon the presentation made in the exhibits already in our jacket in the file.

So far as the law is concerned, we, of course, deal with the Fifth Amendment to the United States Constitution, which provides, if I quote it correctly:

No person shall be held to answer for any c. pital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury.

This is the basis from which flows all considerations legal concerning whether or not perjurious implicating testimony shall vitiate an indictment issuing thereunder.

So far as cases are concerned, it is only in exceptional circumstances and where a bona fide strong showing is made by the defendant regarding improprieties in the Grand Jury proceeding, that they shall be deemed sufficient to provide [fol. 5a] grounds for striking the indictment.

I would cite first the case of Carrado, C-a-r-r——

The Court: Is that in your memorandum?

Mr. Cohen: Your Honor, I must apologize. These are cases which have come to my mind recently.

The Court: All right.

Mr. Cohen: And I did not have them in the memorandum. I came across them yesterday.

The first is our own Court of Appeals case, Carrado,

C-a-r-r-a-d-o, vs. United States, 93, U.S. Ap. D.C. 183, and at 210 Fed. 2nd, 712.

The Court: Same case?

Mr. Cohen: Same case, Your Honor.

The Court: All right.

Mr. Cohen: This was decided in 1954, finally, after a petition for rehearing was denied.

This is not the holding in the case. It is dictum.

In that particular case, to distinguish it quickly on its facts, it was a narcotics indictment, and it was attempted to be shown—as a matter of fact, it was shown, we can assume it—that the chemist who analyzed the materials found, finding them to be narcotics, did not testify for it before the Grand Jury.

The holding in that particular case was that he need not so testify, that there were other evidences of trafficking in [fol. 6a] narcotics more than sufficient to have justified the Grand Jury there in its determination to bring down an indictment.

I quote from that opinion and from its reports in the United States Appeals, D. C., at page 188, language which I think is pertinent to our facts. It is in the second column, middle of the page.

In United States vs. American Medical Association, D. C., 1939, 26 Fed. Sup. 429, at pages——

The Court: That is in this jurisdiction?

Mr. Cohen: Yes, it is, Your Honor.

The Court: That was an opinion by Judge Proctor, was it?

Mr. Cohen, Yes, it was an opinion by Judge Proctor. At pages 430-431—Our late colleague, Judge James M. Proctor, then a District Judge, wrote succinctly as follows, quotes within quotes:

There is no question of a Court's power to go back of an indictment to inquire whether vitiating irregularities induced the finding.

There are then other District cases cited.

The Court continues, quotes:

That is conceded by Government counsel, but it is a power sparingly used, justified only where by proper verified pleading, a clear and positive showing is made of gross [fol. 7a] and prejudicial irregularity influencing the Grand Jury in returning an indictment.

Close quotes.

Now, until the Supreme Court came down with the Costello case, which is Frank Costello, C-o-s-t-e-l-l-o, vs. United States of America, reported at 350 U.S., 359, and more informatively, at 100 Lawyers' Edition, 397, since there is an annotation on our very subject matter appearing after that case, which commences at page 404,——

The Supreme Court held that even assuming that only hearsay evidence was adduced to a Grand Jury in a net worth tax criminal proceeding, such hearsay evidence could be sufficient to justify, substantiate, warrant a return of the indictment.

I would like to quote from the concurring opinion of Judge Burton in that decision; at 100 Lawyers' Edition, page 403, Judge Burton stated:

I agree with the denial of the motion to quash the indictment. In my view, however, this case does not justify the breadth of the declaration made by the Court.

I assume that this Court would not preclude an examination of Grand Jury action to ascertain the existence of bias or prejudice in an indictment.

Now, this is admittedly dicta, since the holding in that case was that hearsay evidence alone, though there be no [fol. 8a] other evidence adduced before the Grand Jury, suffices.

Certainly that case goes no further.

Now, the text writer in the annotation on Costello intimates that the majority view of more Courts, Federal Courts, lower Courts, held the position that, and there seems to have been no dispute, indictments are attackable upon proper grounds.

Here are the grounds which——

The Court: That one Woods promised to a witness to go before the Grand Jury, he wouldn't be prosecuted if he testified against Coppedge? Is that it?

Mr. Cohen: Yes, that is correct, Your Honor.

In this particular—I might say——

The Court: And that Witness then has filed an affidavit indicating that he perjured himself before the Grand Jury. Is that it?

Mr. Cohen: Yes, and for that purpose, Your Honor.

And I might say I have found not one single case dead in

point, despite my own searches and the searches of those who were helping me, on the point of perjured testimony before a Grand Jury.

However, I do have cases to call to Your Honor's attention dealing with self-incrimination and——

The Court: That wouldn't be material here.

Mr. Cohen: Well, I want to show Your Honor that where the Constitutional protections are involved, there, as we [fol. 9a] could suspect, we would be dealing with very, very sensitive areas.

The Court: Well, there is no manner of self-incrimination involved here, so, therefore, there is no Constitutional question. As I understand the gist of the affidavit, it is to the effect that a witness who appeared before the Grand Jury was promised if he went before the Grand Jury and testified falsely against the defendant in this case, he, himself, would not be prosecuted.

Is that it?

Mr. Cohen: Well, if not be prosecuted, he would be — certain considerations, yes.

The Court: Well, or given certain considerations. That doesn't involve the defendant from the standpoint of the 5th Amendment, with reference to self-incrimination, as I see it.

Mr. Cohen: Well, Your Honor, it's been held that if evidence is adduced before the Grand Jury which had, as its basis, actions bringing it into existence through an illegal search and seizure, if evidence is adduced which comes from the defendant's possession without his permission, without any intelligent waiver, which incriminates him, then in those cases, those indictments should be stricken.

Now, I would argue analogously, and I would say a fortiori, if those particular elements which don't involve [fol. 10a] the wilfulness which we here allege are sufficient, then, certainly, and I would say more compellingly, where we have culpatory and false implicating statements made by a witness before the Grand Jury, that it is such taint as must necessarily vitiate that indictment.

The Court: But there is no illegal search and seizure here. There is no evidence forced from this defendant by virtue of what was said before the Grand Jury.

Mr. Cohen: No, Your Honor.

The Court: You have here a situation, again by way of recapitulation, where an individual witness ostensibly went before the Grand Jury on promises made that either he would not be prosecuted or, if he was prosecuted, the punishment, if such was forthcoming, to use that term, would be slight.

So, therefore, your contention, the contention of this defendant, is that this witness then went before the Grand Jury and perjured himself and so he says in his affidavit.

Mr. Cohen: That's my position, Your Honor, and all I do, my last word would be, if for self-incriminatory, if for illegal search and seizure reasons, an indictment be attackable, then certainly an indictment should be attackable in the——

The Court: Well, I want to get this thing in proper posture. The Fifth Amendment is not involved.

[fol. 11a] Mr. Cohen: I would say the Fifth Amendment is involved, Your Honor.

The Court: In what way?

Mr. Cohen: Directly involved. This is direct Constitutional protection that was violated. It provides: No person shall be held to answer, etc., for an infamous—a capital or otherwise infamous crime, unless on a presentment or an indictment of a Grand Jury.

Now, that indictment——

The Court: He was indicted by the Grand Jury, but you are attacking the grounds upon which the Grand Jury has indicted him.

Mr. Cohen: That is correct, Your Honor, and I think I am permitted to.

The Court: Well, I am not saying anything about that. I am only addressing myself to the Constitutional question.

I don't see any Constitutional question at all involved. He was indicted by the Grand Jury and so, therefore, the Constitutional requirement was complied with.

But what you are saying is that the indictment should not have been returned by the Grand Jury because it was obtained by a fraud perpetrated upon the Grand Jury, namely, the perjury of a witness for a price.

Mr. Cohen: The rational behind the cases which have [fol. 12a] disturbed the indictment and stricken it will indicate, at least they indicate to counsel, that the concept here

is whether or not the Grand Jury reached a decision without bias, without prejudice, and upon evidence fairly presented to them.

The Court: Well, I am not—that's the point.

Mr. Cohen: Right.

The Court: But what I am arguing with you now, if I may use that term in the circumstances, is whether or not the Fifth Amendment is involved.

Mr. Cohen: We would take the unequivocal position that it is, Your Honor.

The Court: I would take the unequivocal position that it isn't on the virtue of what you have said, because he was—the Fifth Amendment provides that no individual shall be heard to give evidence against himself and he can't be proceeded against except by an indictment of a Grand Jury.

There was an indictment of a Grand Jury here. There is no question of illegal search or seizure or anything of the nature of forcing evidence out of this man one way or the other.

You are inveighing against the circumstances which are true, which from your point of view, under which the indictment was returned, perjured testimony before the Grand Jury.

[fol. 13a] Mr. Cohen: Well, I would say that the Constitution sounds as tinkling brass and all the rest of those wonderful words people use when they make speeches——

The Court: But I am not making a speech.

Mr. Cohen: No——

The Court: I was addressing myself to the legal end of it.

Mr. Cohen: No. And I was just alluding to the possibility of my making one, which I am sure I don't have to do.

Those words of our Constitution would be meaningless, Your Honor, unless we take steps to make sure that those processes are proper.

The Court: I just want to get the thing in proper posture. That's fine. Thank you.

ARGUMENT FOR THE GOVERNMENT

Mr. Flannery: I think counsel's contention must fail because he doesn't allege that the indictment was secured only on the testimony of Thompkins and there was other

testimony before the Grand Jury which played a part in securing this indictment.

Now——

The Court: Is that indicated here in your response to the motion?

Mr. Flannery: I didn't file a written response, Your [fol. 14a] Honor.

The Court: What?

Mr. Flannery: I didn't file a written response. I am answering his motion now orally.

The Court: Well, I think that should be in here if that is so. He makes the allegation to the effect that the only evidence before the Grand Jury was the testimony of——

Mr. Flannery: I don't think he makes that allegation.

The Court: Well——

Mr. Flannery: He doesn't say "only," Your Honor. He says that the witness Thompkins perjured himself before the Grand Jury, but he doesn't say in his motion that was the only testimony, and, therefore, I think it must fail.

The Court: Well, that's your point?

Mr. Flannery: That's my point, and I have this suggestion, Your Honor. I can get the Grand Jury testimony in this case if Your Honor wants to look at it and submit it to Your Honor, to demonstrate my point.

The Court: Well, I think I should have it if it's written up.

Mr. Flannery: Part of it is written up. I will check my file on that and if it all isn't written up, I will get it written up and submit it to Your Honor and Your Honor can clearly see what occurred before the Grand Jury.

[fol. 15a] The Court: I will take it under advisement.

Mr. Flannery: All right. Thank you.

[fol. 16a] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 1b] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal Action No. 579-58

UNITED STATES OF AMERICA,

v.

MARK COPPEDGE, JR., Defendant

Washington, D. C.

Transcript of Proceedings—Friday, January 22, 1960

The above-entitled cause came on for hearing before the Honorable Alexander Holtzoff, United States District Judge, on a motion of the defendant to compel the production of transcript of Grand Jury proceedings.

APPEARANCES:

Thomas A. Flannery, Esq., Assistant United States Attorney, Counsel for the Government.

Sidney A. Cohen, Esq., 800 Woodward Building, Washington, D. C., Counsel for the Defendant.

[fol. 2b] PROCEEDINGS

The Deputy Clerk: The United States versus Mark Coppedge.

Mr. Cohen: If Your Honor pleases, quite frequently when I appear before the Court, I am not sure what I am doing. In this particular case, I have substantiation. We have Mr. Flannery—he can bear me out. His office has not been informed of any disposition on my most recent motion, which was to reconsider a motion to dismiss the indictment against Mark Coppedge.

To give you the briefest of reviews and show why I am puzzled:

I have filed a motion to dismiss the indictment, claiming there was perjurious implicating testimony adduced before the Grand Jury in the matter.

The Court: That is no reason for dismissing the indictment. In any event, as I understand, the original motion was heard by another Judge.

Mr. Cohen: That is what I am coming to, Your Honor. I am puzzled. Judge McGuire heard and denied that motion of mine.

The Court: What is before the Court?

Mr. Cohen: Then——

The Court: Just a moment. What is before me now? On [fol. 3b] my list it appears as your motion to compel production of transcript of Grand Jury proceedings.

Mr. Cohen: That is correct. I am trying to explain why I don't know if I am properly before Your Honor this morning.

The Court: You are on that motion.

Mr. Cohen: I have a card, which the District Attorney's office never did receive which states,

"Judge McGuire this date denied your motion to reconsider motion to dismiss the indictment in this case."

The Court: Yes.

Mr. Cohen: Now, I would think this would put me out of Court.

However, I find that there is assigned to Your Honor this morning that motion, as I understand it, of the issue dealing with whether or not the transcript of the Grand Jury proceedings should be provided defense counsel.

The Court: Of course, that is a separate motion. The Clerk who sets motions down for argument has no way of determining whether they are inter-connected or not.

In the light of Judge McGuire's decision, do you wish to withdraw your motion, or do you wish to press it?

Mr. Cohen: No, Your Honor, I think I should argue it.

The Court: Very well. I will hear you.

[fol. 4b] Mr. Cohen: Very briefly, the motion was based on perjurious implicating testimony, the evidence of the perjurious implicating testimony being letters written to the Court, of which I have purported copies and signed statements to this effect: The perjurer was a person named Clarence Thompkins. Your Honor may remember him from having the trial in your Court—he was the gentleman who refused, I believe, to even take the stand in the matter.

The Court: I remember the episode very well. He was just terrorized by Coppedge.

Mr. Cohen: If Your Honor please, I am not alleging this; I am stating that this Thompkins, on signed statements, he asserts that he perjured himself.

The Court: He asserts—I imagine that statement was induced by Coppedge. In any event, you cannot try cases twice or in bits. If the testimony was perjured, the jury will so find. We cannot first determine whether the Government's testimony is perjured and then try the case.

Mr. Cohen: I submit that we would have to most respectfully say to the Court on this simple basis, the Constitution and the Fifth Amendment provides that no person shall be held to answer for a capital or otherwise infamous crime unless upon presentation to the grand jury on information —the Fifth Amendment provides due process.

The Court: It is elementary law, and has been so held by [fol. 5b] the Supreme Court in decisions in which counsel perhaps may be familiar—the latest case was the Costello case—that the Court will not review the quantum or the nature of the testimony presented to the grand jury.

I think that I will deny the motion.

Mr. Cohen: Might I argue further? I have the Costello case here, Your Honor, and intended to use it as authority.

The Court: We do not permit access to grand jury minutes except under the most extraordinary circumstances.

Mr. Cohen: Your Honor, may I, just for the record, make a statement that will take two minutes—to protect myself? I am assigned by the Court.

The Court: You are protecting your position by making the motion.

The motion is denied.

(Whereupon, the hearing was concluded.)

[fol. 6b] Reporter's Certificate to foregoing paper omitted in printing.

[fols. 1-1a] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal Action No. 579-58

UNITED STATES OF AMERICA,

v.

MARK COPPEDGE, JR., Defendant

Washington, D. C.

Transcript of Proceedings—March 1, 1960

The above-entitled cause came on for trial before the Honorable Alexander Holtzoff, United States District Judge, and a jury, at approximately 2:15 p.m.

APPEARANCES:

Thomas A. Flannery, Esq., Assistant United States Attorney, Counsel for the Government.

Sidney A. Cohen, Esq., Woodward Building, Washington 5, D. C., Counsel for the Defendant.

* * * * * * *

[fols. 2-4] JURY IMPANELED

The Court: The Court will proceed to impanel a jury. You may swear the jurors for the voir dire examination.

* * * * * * *

The Court: Mr. Flannery, will you identify the case, and then the Court will interrogate the jurors on the voir dire examination.

Mr. Flannery: Yes, Your Honor.

May it please the Court. Ladies and gentlemen of the prospective jury, this is the case of the United States of America versus one Mark Coppedge.

Would you stand, Coppedge, and face those people.

(The defendant stood.)

* * * * * * *

[fols. 5-11] There is a witness, one, Clarence Thompkins, who may be called as a witness by the Government. I believe that he is down in the cell block now in this Court House. He at one time was a defendant in this case.

Hattie McCall will testify as a witness. She is now standing.

The Government planned to call one, Adam Artis, who likewise was a defendant in this case at one time. Mr. Artis is seriously ill with cancer. He is presently in the State of North Carolina, and will not, for that reason, be able to be physically present in Court and testify. However, his name will be mentioned in connection with this trial.

Mr. Joseph Woods of the Federal Bureau of Investigation, a special agent, will testify in this case.

* * * * * * *

[fol. 12] The Deputy Clerk: Members of the jury, do you and each of you solemnly swear that you will well and truly try and a true deliverance make between the United States and the defendant, Mark Coppedge, and a true verdict render, according to the evidence, so help you God?

The Jurors: I do.

(In unison.)

The Deputy Clerk: Will the remaining jurors please return to the jury lounge.

(Accordingly, the remaining jurors left the courtroom.)

Mr. Cohen: If the Court please, may we approach the bench?

The Court: Yes, indeed.

(At the Bench:)

Mr. Cohen: First, I want to apologize to Your Honor for being late.

The Court: It was only three or four minutes. That is all right.

Mr. Cohen: I was before another Judge of the Court.

May I ask Your Honor, and I ask most respectfully and at the request of my client, Mr. Coppedge, whether or not your Honor might consider withdrawing from the case?

The Court: From what?

Mr. Cohen: Withdrawing from the case.

The Court: No, because the case was sent to me to try in [fols. 13-22] the ordinary course of events. I don't think I have a choice in the matter. Those things are not voluntary. It is unethical for a Judge to decline to try a case because it is unpleasant and impose an extra burden on some other Judge. No Judge should ever disqualify himself unless he is legally disqualified.

(Counsel Having Returned to Trial Tables.)

* * * * * * *

[fol. 23] AFTER RECESS

(The Court reconvened at 3:15 p.m., the jury not present.)

The Court: You may proceed.

Mr. Cohen: If Your Honor please, we took the liberty of suggesting to the Marshal to hold the jury off while I address myself to the point we discussed briefly at the bench. I wanted to do this in the presence of the defendant. As Your Honor knows, I was assigned——

The Court: I don't care whether you are assigned or retained, because your authority is the same, and your duty is the same in either event.

Mr. Cohen: I appreciate that my duty would be equal——

The Court: Your duty would be equal, and the limitations are the same.

Mr. Cohen: Yes, Your Honor. At a time most recent, I don't remember the date—it might show on the jacket—a motion came up before Your Honor in the case attacking the indictment. What I am addressing myself to is the problem as to whether or not, at the request of the defendant, the Court might not sit upon this matter.

The Court: You have already brought that up at the bench conference, and I have disposed of the matter. You may not bring it up again.

[fol. 24] You may proceed.

Mr. Cohen: For the record, if I may give the reasons——

The Court: No, you may not. I don't know what you mean when you say, "for the record." Cases are tried before the Court and a jury; they are not tried "for the record."

You may resume your seat, sir.

You may bring in the jury.

I am going to ask counsel to come to the bench.

(Accordingly, counsel approached the bench for an off-the-record conference.)

(The jury returned to the courtroom at 3:17 p.m.)

The Court: You may proceed, Mr. Flannery.
Mr. Flannery: Thank you, Your Honor.
Please call Agent Woods.

Thereupon, JOSEPH I. WOODS, called as a witness in behalf of the Government, being first duly sworn, was examined, and testified, as follows:

Direct examination.

By Mr. Flannery:

Q. Please state your name?
A. Joseph I. Woods.
Q. You are a special agent of the Federal Bureau of Investigation?
[fol. 25] A. Yes, sir.

The Court: Is it "Wood" or "Woods?"
The Witness: Woods, sir—with an "s."
The Court: Thank you.

Q. (By Mr. Flannery) Mr. Woods, do you know one, Adam Artis?
A. Yes, sir.
Q. Was he at one time a defendant in this case?
A. Yes, sir; he was.
Q. Did you interview him in connection with this case?
A. I interviewed him only partially, the day before he came into Court.
Q. Were you present in this Court——

The Court: I am going to ask counsel to come to the bench.

(AT THE BENCH:)

The Court: Unless defense counsel feels otherwise, I think, as a matter of fairness,—as a matter of fairness to

the defendant and the Government, too, for that matter, but as a matter of fairness to the defendant particularly—the fact that there has been a prior trial ought not to be referred to.

If you have to refer to testimony given by some witness at the first trial, of course, you have a right to do that, but I venture to suggest that you refer to the prior "hearing," [fol. 26] so that the jury won't realize that it was a prior trial, for this very reason: Juries are just as human as you gentlemen and I. They are not automatons. They will naturally be wondering what happened at the first trial; they might even be curious enough and resourceful enough to find out.

That is only by way of suggestion. Of course, I cannot direct you not to refer to it.

Mr. Flannery: Very well.

Mr. Cohen: Yes, Your Honor.

(Counsel Having Returned to Trial Tables:)

The Court: You may proceed, Mr. Flannery.

Mr. Flannery: Thank you, Your Honor.

Q. (By Mr. Flannery) Mr. Woods, were you present in Court when Adam Artis entered a plea of guilty in this case?

A. Yes, sir.

Mr. Flannery: Miss Clerk, would you please mark this.

Mr. Cohen: I am going to have to object to this line of questioning. I don't see what Mr. Flannery is driving at.

The Court: This is preliminary, laying a foundation, I presume.

Mr. Cohen: I don't appreciate its materiality.

The Court: I know. We can't tell the materiality until the line of inquiry is developed a little bit.

Mr. Flannery: May I show this to counsel, Your Honor? [fol. 27] The Court: Yes, indeed.

(Accordingly, Government's Exhibit No. 1, a photograph, was marked for identification.)

Q. (By Mr. Flannery) Mr. Woods, I will hand you this photograph, marked Goverment Exhibit No. 1 for identification.

Can you testify whose photograph that is?

A. Yes, sir: that is the photograph of Adam H. Artis.

Q. And he was at one time a defendant in this case?

A. Yes, sir.

Mr. Flannery: Very well. Your Honor, may I offer this photograph, Government Exhibit No. 1, in evidence.

The Court: How is that relevant?

I think that it is now proper for Mr. Cohen's objection to be entertained.

Mr. Flannery: May we approach the bench and explain, if Your Honor please?

The Court: Yes, indeed.

(At the Bench:)

Mr. Flannery: Your Honor, Mr. Artis is very ill with leukemia, which is cancer of the blood, and he is dying. I have been in touch with his doctor. I talked to him over the telephone several weeks ago, and he confirmed our telephone conversation in this telegram which I have.

(The document was handed to the Court.)

Mr. Flannery: The substance of that telegram——

[fol. 28] The Court: Yes, but what is the relevancy of the photograph? That is the question.

Mr. Flannery: At the prior hearing, Your Honor, certain witnesses were able to point to Adam Artis and say, "He is the person who uttered the money orders to me." I don't have him physically present here today, so at the appropriate time, I would desire to show them the photograph of Adam Artis and say, "Is this the person who uttered the money orders?"

The Court: You have had it marked for identification. I would suggest that you withhold offering it in evidence until it becomes connected up that way.

Mr. Flannery: Very well.

The Court: I think that after he has identified him as an actor in one of these proceedings, then you may offer it in evidence. I suggest that you withhold it in the meantime.

Mr. Flannery: Very well, Your Honor.

(Counsel Having Returned to Trial Tables.)

Mr. Flannery: Those are all the questions I have of this witness, Your Honor.

The Court: Any cross-examination?

Cross-examination.

By Mr. Cohen:

Q. Mr. Woods, have you ever had conversation with [fol. 29] Clarence Thompkins, a co-defendant in this case——

Mr. Flannery: I object, Your Honor.

The Court: I am going to sustain the objection. That is outside the scope of the direct examination.

Mr. Cohen: Very well, Your Honor.

Thereupon, Morris Gevinson, called as a witness in behalf of the Government, being first duly sworn, was examined, and testified, as follows:

Direct examination.

By Mr. Flannery:

Q. Will you please state your name?

A. Morris Gevinson.

Q. Mr. Gevinson, calling your attention to December 1957, did you own and operate a business in the District of Columbia during that month?

A. I did.

Q. Where was that business located?

A. The name was Springview Farms; it was located at 2744 Fourteenth Street, Northwest.

The Court: Give me that address again, please?

The Witness: 2744 Fourteenth——

The Court: 2744 Fourteenth Street. Thank you very much.

The Witness: Yes, Your Honor.

[fol. 30] Q. (By Mr. Flannery) Calling your attention to the day, on or about December 4th, 1957, and handing you Government Exhibit No. 1 for identification, did you see that individual on that date?

A. It appears to be a man who came into my store to cash a money order.

Mr. Cohen: I would object to that identification, Your Honor,—"it appears to be."

The Court: Objection overruled.

Q. (By Mr. Flannery) Now, then,——

Mr. Flannery: Please mark this.

(Accordingly, Government Exhibit No. 2, Nation-Wide Money Order, was marked for identification.)

Q. (By Mr. Flannery, continued) Now, Mr. Gevinson, I will hand you what has been marked as Government Exhibit No. 2 for identification, a Nation-Wide Money Order.

Have you ever seen that before?

A. Yes, this was the check the man gave to me when he came into the store.

Q. Do you recall what time of the day it was on December 4th, 1957, that he came into your store?

A. It was in the evening; the early evening.

Q. Very well. Now, then, to the best of your recollection, exactly what occurred when this individual came to your store—just what happened between you and him?

[fol. 31] A. He came in to buy some groceries and offered this check as payment. And I took the check, and it looked peculiar to me, and he gave me a Social Security card and his work permit, and I called the police.

Q. Did this individual identify himself by name by means of his identification?

A. Yes, he did.

Q. And what name was that?

A. Artis.

Q. Artis?

A. Yes.

Q. Very well. Now, then, calling your attention to Government Exhibit No. 2, this Nation-Wide Money Order, what name does that bear on there?

A. Adam H. Artis.

Q. Very well. Now, then, what happened when you started to make the 'phone call?

A. He ran out of the store.

Q. Very well. And did he leave this exhibit—Government Exhibit No. 2?

A. He left that check, plus the work permit.

Q. In the store?

A. In the store.

Q. Very well. Did you then turn the check over to law enforcement officials?

[fol. 32] A. Yes. sir.

Q. Very well.

OFFER IN EVIDENCE

Mr. Flannery: Your Honor, may I renew my offer into evidence of this photograph, Government Exhibit No. 1.

The Court: Are you offering Exhibits 1 and 2, both?

Mr. Flannery: Just one for the moment.

The Court: Exhibit 1 may be admitted.

Mr. Cohen: I make an objection.

The Court: What is the ground of your objection?

Mr. Cohen: It is the same ground I stated. He said, "It appears to be."

The Witness: I will reword——

The Court: State your objection, ——

Mr. Cohen: Also, an additional ground, it is prejudicial——.

The Court: State your objection in legalistic phraseology, and not in an argumentative fashion.

Mr. Cohen: I'm sorry.

The Court: What is your objection?

Mr. Cohen: First, the witness says, "He appears to be"; those were his exact words.

The Court: Overruled.

Mr. Cohen: And also——

The Court: Objection overruled. I will admit it.

You may pass it to the jury, if you wish.

[fol. 33] Mr. Flannery: Thank you, Your Honor.

(Accordingly, Government's Exhibit No. 1, previously described, was admitted in evidence. The exhibit was passed to the jury.)

Mr. Flannery: Those are all of the questions I have of this witness, Your Honor.

The Court: Any cross-examination?

Mr. Cohen: Yes, Your Honor; I have some questions.

Cross-examination.

By Mr. Cohen:

Q. Mr. Gevinson, have you ever seen Mr. Coppedge, this gentleman seated here?

Would you stand, Mark, please.

The Court: This is not proper cross-examination.

This is outside of the scope of the direct examination.

Mr. Cohen: I intended to connect this up, Your Honor.

The Court: I have ruled.

You may call him later on as your own witness, if you wish; you have that right; but cross-examination must be confined to matters in regard to which the witness was examined on direct examination, unless you want to question his credibility.

Mr. Cohen: Yes, Your Honor.

I have one or two other questions.

[fol. 34] Q. (By Mr. Cohen) Mr. Gevinson, with regard to the picture which you identified as being the gentleman who gave you the money order:

Was that money order signed in your presence?

A. No, it was not, that I recall.

Q. And how positive are you in your identification of the gentleman appearing on that picture as being the person you saw?

A. That is the first time I saw the picture of him. I saw him in person before.

Q. Do you have any reasonable doubt in your mind——

A. No.

Q. —that the picture you saw is that person?

A. It looks like the person I cashed the check for.

Q. You are not positive, is that correct?

A. Well, I am reasonably sure it is.

Q. Why are you reasonably sure?

A. Of course, it has been quite sometime since I have seen the man or his picture.

Q. Which is why you are not positive?

A. That is right. Outside of that——

Mr. Cohen: Nothing further.

Redirect examination.

By Mr. Flannery:

Q. You recall that the person identified himself to you [fol. 35] as being Adam Artis?

A. That is right.

Mr. Flannery: That is all.

The Court: You may step down.

(The witness stepped down.)

Thereupon, ABRAHAM BORAK, called as a witness in behalf of the Government, being first duly sworn, was examined, and testified, as follows:

Direct examination.

By Mr. Flannery:

Mr. Cohen: May I request, Your Honor, since there is a likelihood——

The Court: Let the witness be sworn. Just a moment.

Mr. Cohen: I'm sorry.

(Thereupon, the administering of the oath to the witness was completed, and the witness took the witness stand.)

The Court: What is your request, Mr. Cohen?

Mr. Cohen: Since there is a likelihood that I will be calling witnesses that are called by the Government, I would request the rule on witnesses with regard to those persons.

The Court: If you will state which witnesses you might recall, why, of course, I will ask the witnesses to withdraw into the witness room.

[fol. 36] Are you planning to call Morris Gevinson?

Mr. Cohen: Yes, Your Honor.

The Court: Very well. Then we will ask you to withdraw into the witness room, Mr. Gevinson.

Mr. Cohen: I also may be calling Mr. Woods.

The Court: Very well. Let Mr. Woods withdraw to the witness room.

Q. (By Mr. Flannery) Mr. Borak, please keep your voice up——

A. I will.

Q. What is your full name?

A. Abraham Borak.

Q. B-o-r-a-k?

A. B-o-r-a-k.

Q. B-o-r-a-k?

A. Yes.

Q. Mr. Borak, I call your attention to the month of December, 1957.

Did you own and operate a business in the District of Columbia on that day?

A. Yes, sir.

Q. What was the name of that business?

A. Gayety Wine and Liquor. Gayety Wine and Liquor.

The Court: What is the name of the business?

The Witness: 530 Ninth Street, Northwest.

[fol. 37] The Court: What is the name of the liquor store?

The Witness: Gayety.

The Court: You speak too fast. Will you spell the name of the liquor store.

The Witness: Gayety.

Mr. Flannery: G-a-y-e-t-y, Your Honor. The Gayety Liquor Store. It was located at 503 Ninth Street, Northwest?

The Witness: Yes, sir.

Q. (By Mr. Flannery) In the District of Columbia?

A. Yes, sir.

Q. Now, then, Mr. Borak, I call your attention to December 2nd, 1957,—did an individual come into your store that day with a money order?

A. No, not that——

The Court: I am going to interrupt you, Mr. Flannery. I think it would be very helpful to the Court if you state, as we go along, to which count of the indictment the various bits of testimony are directed.

Now, the Gevinson testimony was directed to what count?

Mr. Flannery: The Gevinson check, Your Honor, was counts three and four.

The Court: Very well. And this testimony will be directed to what count?

Mr. Flannery: Five, six and seven, Your Honor.

[fol. 38] The Court: Thank you.

Mr. Flannery: Miss Clerk, please mark this.

(Accordingly, Government's Exhibit No. 3, Nation-Wide Money Order, was marked for identification.)

The Court: You may proceed.

Mr. Flannery: Very well, Your Honor.

Q. (By Mr. Flannery) Mr. Borak, I will hand you what has been marked Government's Exhibit No. 3 for identification, this Nation-Wide Money Order.

I will ask you to look at it. Can you identify it?

A. Yes, sir; my signature is over here. At the bottom.

Q. When did you first see this money order, Government Exhibit 3 for identification.

A. I—I—when I cashed them—not him—there was another man—he didn't come into the store to cash it.

Q. A man came into the store, is that right?

A. Yes. Yes.

Q. Now, then,——

Mr. Flannery: Let me have that picture, please.

Q. (continued) I will hand you Government Exhibit No. 1——

A. Yes, sir.

Q. Is that the man who came into your store on December 2nd, 1957?

A. Yes, sir. Yes, sir. Yes, sir.

[fol. 39] Q. Very well. Now, when that man came into your store, what happened between you and him?

A. He used to come in before that time; a few times; bought some stuff off me. That time——

The Court: Speak a little slower, because we all have to understand what you are saying, and the reporter has to record everything you say.

The Witness: He come in there a few times to me before we cashed that money order—he bought something from me.

Q. (By Mr. Flannery) He had come into your store previously?

A. Yes.

Q. When he came in on this date, December 2nd, 1957, what happened?

A. He says if I could cash the money order, and I says, "Where you get the money order?" He says he got an uncle somewhere and he sent every month a hundred dollars, he said.

Q. Did he give you a money order?

A. Yes, and I give him——

Q. Is that the money order?

A. Yes, sir. Yes, sir.

Q. All right. When he gave you the money order, did you cash it?

A. Yes.

[fol. 40] Q. And how much money did you give him?

A. A hundred dollars.

Q. A hundred dollars?

A. Yes.

Q. Now, did he identify himself by his name?

A. Yes. Yes.

Q. What name did he identify himself by?

A. I don't remember, but he showed me everything. He had some kind of cards.

Q. Did he put the endorsement on the back of it?

A. Yes, that is it. Yes, he signed the front of it.

Q. What endorsement did he put on the back? Can you read it?

A. No.

Q. Did you endorse it?

A. Yes, I endorsed it.

Q. Is that your name on there—"Borak?"

A. Borak, yes. (Indicating.)

Q. Now, did there come a time when payment was stopped on this money order?

A. The money order come back to me.

Q. Did you lose the sum of one hundred dollars?

A. Yes, I lost a hundred dollars.

Mr. Flannnery: All right. That is all.

[fols. 41-81] Cross-examination.

By Mr. Cohen:

Q. Mr. Borak, I believe, in answer to Mr. Flannery's question, twice you said something to the effect—"not this man, he didn't come in?"

A. No. No.

Q. Had you ever seen this man before in the neighborhood?

A. Oh, sure; I know him well.

Q. As Mr. Coppedge?

A. Yes, I know him.

Q. Did you see Mr. Coppedge that evening when Mr. Artis came in with this?

A. No.

Mr. Cohen: Nothing further, Your Honor.

The Court: You may step down.

(The witness stepped down.)

• • • • • • •

[fol. 82] (At the Bench:)

Colloquy Between Court and Counsel

Mr. Flannery: As Your Honor may recall, at the prior trial Adam Artis testified. He was a defendant——

The Court: Who?

Mr. Flannery: Adam Artis.

The Court: I remember him. He was that sick man. I think that I put him on probation, didn't I, or gave him a short sentence?

Mr. Flannery: I think you gave him a short sentence.

The Court: I think that I gave him a short sentence in [fol. 83] order that he could be hospitalized.

Mr. Cohen: It was a good idea, under the circumstances.

Mr. Flannery: I am unable to produce him at this trial. I desire to read his sworn testimony at the prior trial to this jury. I have in my possession a telegram from Artis's doctor in the State of North Carolina, and I talked to his doctor by telephone, and he confirmed our conversation by means of this telegram.

Artis has leukemia in an advanced stage; he is not ex-

pected to live very long. He also has developed a mental condition, schizophrenia, paranoid type. In the doctor's opinion, he is unable to appear here because of those medical reasons, and I feel that the authorities hold, under those circumstances, where a witness is legally unavailable, either because of death or illness of this nature, and he has testified at a prior trial and has been subject to cross-examination, it is permissible to introduce into evidence his prior testimony, and I make that proffer, Your Honor.

The Court: Mr. Cohen, what do you say?

Mr. Cohen: For two reasons I don't think it is proper. One would be that in my possession—I didn't know this would be the subject of the conference—I have a writing—I can get it—signed by Mr. Artis, stating that the testimony that he gave, to which Mr. Flannery refers, was just not so. [fol. 84] The Court: That, of course, has no bearing upon this matter. Let's develop clarity of thinking here—one thing at a time. I have to determine whether it is admissible for Mr. Flannery to read his testimony at the prior trial.

Mr. Cohen: Yes.

The Court: Now, the fact that he later recanted his testimony, if he did, would not affect its admissibility.

I will hear you on the question of admissibility.

Mr. Cohen: Yes, Your Honor. I would respectfully submit that it relates—my second point would be that he is not now subject to cross-examination at this trial.

The Court: I know, but the law is well established that if a witness has been cross-examined once at a prior trial and becomes unavailable, his testimony at the prior trial may be read.

Now, is there any objection, in the light of the circumstances stated by Mr. Flannery? You know the general principles of law.

Mr. Cohen: Yes.

The Court: There is no use arguing that. The question is, is it applicable to this case?

Mr. Cohen: Yes, Your Honor. I would say that in this particular instance, the general rule, which is as Mr. Flannery and the Court has intimated, should not apply.

[fol. 85] The Court: Why?

Mr. Cohen: For the reason that at the time he first testified, this statement that I have signed by the gentleman was

not in existence, was not available to defense counsel. This is a trial we are engaged in presently—the other trial was in the past—this is something I would use——

The Court: I would be inclined, as a matter of justice,—of course, that would be in violation of the rules of evidence—but I would be inclined, as a matter of justice, to allow Mr. Cohen to offer that written statement in evidence if it is genuine.

Mr. Flannery: Yes. Of course, I have no doubt but that he is making the offer in good faith, but the thought occurs to me, how could I stipulate that it is genuine?

The Court: What is that?

Mr. Flannery: I am not too sure that I could stipulate—might I inquire how that came into your possession?

Mr. Cohen: This was found by me in the file of the case which I got from, I believe, I am not positive, the firm of Covington & Burling. I either received it there——

The Court: Covington & Burling—were they in this case?

Mr. Cohen: They were appointed by the Court of Appeals in the appeal—I don't want to represent that to the Court absolutely—I am not positive. I also might have gotten it [fol. 86] from Mr. Dietz, the attorney who represented Mr. Coppedge the first time.

The Court: I think that before passing upon the admissibility of that statement, that Mr. Flannery ought to have an opportunity to examine it. Do you know of anyone who is familiar with the handwriting of the witness.

Mr. Flannery: I will check with the Federal Bureau of Investigation; they may be able to check it.

Mr. Cohen: If Your Honor please, on that point, if I may, it is very appropriate, we have in evidence, put in evidence by the Government, I think, two or possibly one of the money orders which bear his ordinary, normal signature, and I have already——

The Court: So you have a basis of comparison.

Mr. Cohen: —compared them, and they appear genuine.

The Court: You have no objection, have you, Mr. Cohen, to turning that statement over to Mr. Flannery so that he can have the F.B.I. compare the handwriting in that statement with the known specimens?

Mr. Cohen: None whatsoever, Your Honor, I am sure.

The Court: I want to ask you one thing more: Do you

question or do you concede Mr. Flannery's statement that this witness is unable to be produced?

Mr. Cohen: Of course, without asking to read the telegram. I certainly accept Mr. Flannery's word. I have no [fol. 87] doubt but that the witness is unavailable.

The Court: Because, of course, I could require Mr. Flannery to take the doctor's deposition, if you made a point of that.

Mr. Cohen: No.

The Court: I would grant him a continuance for that purpose?

Mr. Cohen: No.

The Court: I did not think you would, but I think that you ought to offer the telegram in evidence.

Mr. Flannery: I will show it to Mr. Cohen and then offer it in evidence.

Mr. Cohen: I still object, Your Honor, I just want to make that clear, to any reading of Mr. Artis's prior testimony.

The Court: Yes. Then we will take our usual mid-afternoon recess.

I just do not think that it would be fair, if that statement is genuine, to exclude it, but actually it is inadmissible under the rules of evidence.

Mr. Flannery: I agree, Your Honor.

Mr. Cohen: Might I say one thing more. I think, Your Honor, that in the record of the prior trial Your Honor made reference to his opinion that the testimony of Mr. Artis was very valueless, and Mr. Flannery agreed. I can [fol. 88] give Your Honor the page citation—you may recall it.

The Court: I have forgotten. You know an awful lot of water has gone under the bridge. I have tried a great many cases since then. It is strange how the details of testimony get away from you after you have tried a great many other cases.

Mr. Cohen: Might I respectfully suggest refreshing Your Honor's recollection, if I can give you the page.

The Court: That would not affect the admissibility. What I mean is that the probative value, or lack of it, of the testimony does not affect its admissibility, that is what I mean.

Mr. Cohen: Under these circumstances, there might be a relationship.

The Court: I do not think it is within the discretion of the Court. I think that if the facts are established as to the inability to produce the witness, it is a matter of right to read his prior testimony.

Mr. Cohen: May I refer to it anyway?

The Court: Yes.

Mr. Flannery: I will withhold reading it. I would like to close with that testimony. Now that I have the ruling, I will withhold it.

The Court: I suggest that at the close of today's session that Mr. Cohen turn over to you that statement that is in [fol. 89] his possession so that you can have its genuineness checked.

Mr. Cohen: Yes, Your Honor.

* * * * * * *

[fol. 90] (At the Bench:)

Mr. Cohen: If I may just read into the record the prior remarks made by the Court. I could give the page citation. That will be quicker.

The Court: What is the page citation?

Mr. Cohen: Page 321, Your Honor, continuing on page 322.

The Court: What line?

Mr. Cohen: Actually the statement begins at the very bottom of page 321, and continues over to page 322. And I would include in that——

The Court: Yes, I see that remark. I see no reason for reading it into the record again, is there?

Mr. Cohen: I am just giving a citation. Another reference is made in Your Honor's charge in the prior case at page 467 to the nature of that testimony.

The Court: Well, that is the usual instruction. That is all.

[fol. 91] Mr. Cohen: Yes, sir. You also do mention your impression of the witness.

The Court: Yes, I did say that he was somewhat confused on the witness stand.

Mr. Cohen: Yes, Your Honor.

The Court: That, however, has no bearing on the question of whether I should admit the testimony.

Mr. Cohen: Of course, that is still over my objection, even

though I agree that if his testimony should be found admissible by Your Honor that I would like introduced in evidence the statement which we have from Mr. Artis that we discussed.

The Court: I am going to depart from the rules of evidence, because I think that if I enforce the rules of evidence, it might lead to an injustice, and I have already said that after Mr. Flannery has had an opportunity to have the F.B.I., or anyone else who is qualified to do so, check the handwriting in that statement, I will let you introduce it, if you choose to do so.

Mr. Cohen: Fine. Of course, we only refer to the signature—I don't believe that the same writing appears throughout; it is his signature.

The Court: Oh, his signature?

Mr. Cohen: May I show you that statement, Your Honor? [fol. 92] (Whereupon, Mr. Cohen handed the statement to the Court.)

The Court: Yes, yes. Oh, that is a little different.

Mr. Cohen: It is not the whole paragraph; it is only the signature.

The Court: I misunderstood Mr. Cohen.

Mr. Cohen: I didn't mean to imply——

The Court: I don't mean that you said anything that led me to misunderstand you. I misunderstood you. I thought that you meant the entire note was in his handwriting.

That seems strange. It is undated and unsworn to, although there is a place where it could be sworn to.

I will not admit that. I will retract my ruling.

Mr. Cohen: Your Honor, if we establish that that is Mr. Artis's signature——

The Court: Even if it is his signature; he is a sick man. I don't know whether the statement was put under his nose, so to speak, to sign.

Mr. Cohen: Of course, I can't——

The Court: I will tell you something about this handwriting: I don't know whose handwriting it is, but I think that it is the handwriting of some gentleman who is an inmate of the penitentiary, because I have received papers [fol. 93] from other prisoners in this handwriting.

Now, that is all right. There is no impropriety in that. It is just like in the old days, you know, when the majority

of the people were illiterate, there were certain persons who hired themselves out to write letters for them and compose letters for them—that was done in the Middle Ages—so I have noticed that most of the papers that emanate from the jail are written in a handwriting other than that of the person signing them.

All Judges get papers like that time and time again. But this particular handwriting—and, of course, I am not an expert in handwriting—but it resembles very much the handwriting of some other papers that I have received from the penitentiary.

Mr. Flannery: A well known term—they call them jail house lawyers, Your Honor.

The Court: Jail house lawyers, as the old saying goes. In the Army they used to call them guard house lawyers.

Mr. Flannery: That's right.

The Court: I am certainly not going to admit this under those circumstances.

Mr. Cohen: I would, of course, respectfully object.

The Court: It is inadmissible under the rules of evidence anyway, but I thought that if this was something in his handwriting, I ought to depart from the rules of evidence [fol. 94] and admit it. This is not in his handwriting. His signature is scratched at the bottom of it, and it is not sworn to.

Mr. Cohen: Would Your Honor compare the signature and his signature appearing in the Government's exhibits?

The Court: I am not going to set myself up as a handwriting expert. However, I might glance at it.

You see, the man is obviously illiterate. He does not know enough to use capital letters, for example.

Mr. Cohen: People sign their names in different ways.

The Court: He may not even have been able to read this.

Mr. Flannery: He was a sick man, too, and Coppedge has a reputation for being vicious.

The Court: I won't express an opinion as to whether or not the handwriting is the same. I do notice a little difference, a characteristic difference, perhaps, I don't know—this endorsement uses a capital "A." Here he uses a small "a" for his own name.

Mr. Cohen: That is a matter of judgment.

The Court: Oh, no, that is a very vital difference. It shows

that the real Artis knew enough to use capital letters. Here he didn't. Here, clearly, he didn't. I am not going to admit it.

Mr. Cohen: It is a matter of the size of the letter "A."

[fols. 95-164] The Court: At the proper time, if you wish, Mr. Cohen, you can have it marked for identification, but I am not going to admit it, in view of the fact that it is not in his handwriting.

Mr. Cohen: I just want to be sure that I have not consented to the reading of the prior testimony.

The Court: I have overruled your objection.

Mr. Cohen: Yes, Your Honor.

The Court: But you are not making any objection based on the ground that the telegram is not sworn to?

Mr. Cohen: That would be specious.

The Court: If you do, I would continue the case, and allow Mr. Flannery to take the doctor's deposition.

Mr. Cohen: No, Your Honor; that would be fruitless.

(Counsel Having Returned to Trial Tables.)

* * * * * * *

[fol. 165] Government Exhibit 9 Read into Record

Mr. Flannery: Your Honor, may I now read the telegram and read the testimony of the missing witness?

The Court: Yes, indeed.

Mr. Flannery: May it please the Court and ladies and gentlemen, I will now read to you what has been admitted into evidence as Government Exhibit 9. This is a telegram from a Dr. Edgar T. Beddingfield. It is addressed to Thomas A. Flannery, Assistant United States Attorney, District Court House, Third and C Streets.

"Confirming our telephone conversation in regards to Adam H. Artis, he is presently under my care and in my opinion unable to appear in court.

"Diagnosis is chronic lymphatic leukemia, chronic brain syndrome, paranoid, schizophrenia with mental deterioration.

"Can supply further detailed information, if necessary.

"Edgar T. Beddingfield."

Mr. Cohen: Your Honor, may we approach the bench?
The Court: Yes, indeed.

[fol. 166] COLLOQUY BETWEEN COURT AND COUNSEL

(AT THE BENCH:)

Mr. Cohen: I apologize. This didn't occur to me earlier when we discussed this. I would like a report from the doctor from whom we got the telegram as to whether or not at the time the testimony we are about to have read was given Mr. Artis was so incapacitated with his paranoia as to make his testimony unreliable.

The Court: I have no way of getting any such report for you. Moreover, that doctor probably was not in touch with the witness Artis at the time. The witness Artis was not hospitalized at that time. He was brought here from jail.

Mr. Cohen: I appreciate that, Your Honor, and I am certainly a layman. I am not a doctor. But I believe that the type of malady described, paranoia, is such to be of longstanding upon definition.

The Court: Where is this doctor?

Mr. Flannery: He is in North Carolina. He is a general practitioner.

The Court: I will say this. Of course, we are all laymen when it comes to psychiatry. We all know, however, as you suggest, and you are quite correct, that schizophrenia does not come overnight. It is a progressive disease, but it starts and it flows over a long period of time. Now, this testimony was given in 1958, almost two years ago. Now, a man may [fol. 167] be suffering from schizophrenia today without having suffered from it two years ago. Of course, if he suffers from it today, the chances are he suffered from it a week ago, but it does not follow that he suffered from it two years ago.

Mr. Cohen: What Your Honor says is quite so. We deal here with a relative matter, a difficult matter of expertise, at best. I don't pretend to know.

The Court: He was here. He was produced from jail. He was not in any mental hospital at the time. If he had been in a mental hospital, I doubt very much whether I would have permitted him to testify.

Mr. Cohen: Of course, Your Honor, we are faced now

with a written record that will be presented before this present jury hearing the case. I think Your Honor's comments at the time as to the nature of the testimony given by Mr. Artis, and also a reading of Mr. Artis's testimony, which I read again for the second time this morning——

The Court: What is your request, Mr. Cohen?

Mr. Cohen: My request is, Your Honor, and I think it could be done expeditiously, to obtain an informed opinion from the doctor who gives us this telegram as to whether or not the condition presently found, that is, the mental condition in Mr. Artis, was so incapacitating or existed to such degree at the time he gave the testimony we are about to merely read to the jury as to make it, shall we say, untrust-
[fol. 168] worthy sufficient to be inadmissible.

The Court: I think there is no burden on the part of the Government to produce any such testimony.

Mr. Cohen: Well, Your Honor, I would attempt to, if needs be, produce that testimony.

The Court: You have a perfect right to do it if you wish.

Mr. Cohen: I see, I do, surely, in my own case.

The Court: But the Government is under no burden to produce it.

Mr. Cohen: Of course, Your Honor, we are about to, in the Government's case at this juncture, put in that testimony of Mr. Artis.

The Court: We are going to put it in at this moment. In any event, if testimony such as you suggest is to be put in, it would have to be put in as part of the defendant's case but not in connection with this testimony.

Mr. Cohen: Of course, I would say it could go in, but Your Honor has ruled. I think Your Honor more than understands the point I raised. It will be too late, and it will be like locking the barn door after the horse is stolen.

The Court: I am not going to direct the Government to produce any such testimony that they are under no such burden to produce. I might say in passing that the Court of Appeals has ruled, in fact the Supreme Court of the United
[fol. 169] States has ruled that where insanity is in issue as to a defendant in a criminal case, the burden of proof is on the Government to prove sanity, but there is no such burden as to a witness.

Mr. Cohen: I would just say this, Your Honor. That is

quite so. Here I would like the opportunity should the burden even be on me, in this instance, to attempt to meet that burden.

The Court: You have a right to do it.

Mr. Cohen: Prior to the time—

The Court: Oh, no, no. If you want to meet it, if you want to raise that issue, you should do it during the case of the defense.

Mr. Cohen: Well. I submit that would be too late.

The Court: I think before you start reading the testimony we will take our usual recess.

* * * * * * *

READING OF PORTIONS OF TESTIMONY OF ADAM ARTIS AT A PRIOR PROCEEDING INTO RECORD

Mr. Flannery: May it please the Court and ladies and gentlemen of the jury, with the Court's permission, I will now read to you the testimony of the witness, Adam Artis, the witness who is sick, the testimony given at a prior pro-
[fol. 170] ceeding in regard to this matter on December 11, 1958. Reading starting at page 262.

The Court: 262?

Mr. Flannery: 262. "Adam Artis called on behalf of the government and having been duly sworn, was examined and testified as follows:" And now, Your Honor, I pass to page 265. There was certain colloquy on the intervening pages which have nothing to do with this.

The Court: I don't think colloquy should be read.

Mr. Flannery: Page 265.

"Direct Examination

"By Mr. Flannery:

"Question. Mr. Artis, I want you to keep your voice up so I can hear you way back here. Lean forward a little bit and talk into the microphone.

"Now, what is your full name?

"Answer. Adam Huldah Artis.

"Question. Adam Huldah Artis. Now, Mr. Artis, at one time you were a defendant in this case, were you not?

"Answer. Yes, sir.

"Question. And you have entered a plea of guilty to one of the counts in this indictment, have you not?

"Answer. That's right.

"Question. Now, Mr. Artis, I call your attention to De-
[fol. 171] cember of 1957. Do you recall that month?

"Answer. Yes, sir.

"Question. At that time did you know one Mark Coppedge?

"Answer. Yes, sir.

"Question. Do you see him here today?

"Answer. Yes, sir.

"Question. Will you step down from where you are seated and point to Mark Coppedge wherever he is.

"(The witness stepped down to Defense Counsel table and pointed)

"Mr. Flannery: May the record indicate, your Honor, that the witness has pointed to the defendant Coppedge in this case.

"The Court: The record may so indicate.

"By Mr. Flannery:

"Question. While you are standing here, during the month of December, 1957, did you know one Tyler, Clarence Tyler?

"Answer. Yes.

"Question. Do you see him here today?

"Answer. Yes.

"Question. Will you point to him?

"Mr. Flannery: May the record indicate, Your Honor, that this witness has pointed to the defendant Tyler in this
[fol. 172] case.

"The Court: The record may so indicate.

"By Mr. Flannery:

"Question. Now, Mr. Artis, at that time, in December of 1957, did you know one Allen Alexander?

"Answer. Yes, sir.

"Question. Do you see him here today?

"Answer. Yes, sir.

"Question. Will you please point to him?

"Answer. (Pointing)

"Mr. Flannery: May the record indicate that this witness has pointed to Allen Alexander in this case.

"The Court: The record may so indicate.

(Witness resumed the stand.)

"By Mr. Flannery.

"Question. Now then, in December of 1957, the early part of December of 1957, did there come a time one snowy Saturday afternoon when you saw anyone?

"Answer. Yes, sir.

"Question. Who did you see?

"Answer. Mark Coppedge, Tyler——

"The Court: Suppose you talk through the microphone.

"The Witness: Mark Coppedge, Tyler and Allen.

"By Mr. Flannery:

"Question. Where did you see these——

[fol. 173] "The Court: Whom do you mean by Allen, what is his last name?

"The Witness: Alexander.

"By Mr. Flannery:

"Question. The three defendants seated here at counsel table?

"Answer. (Nods head)

"Question. Where did you see them?

"Answer. On Champlain and Kalorama Road, N. W.

"Question. In the District of Columbia?

"Answer. Yes, sir.

"Question. Do you recall what time of the day it was?

"Answer. I guess it was around 7 o'clock.

"Question. A. m. or p. m.

"Answer. P. m.

"Question. Are you able to fix the date or do you more or less have to guess just about what time it was?

"Answer. Guess.

"Question. And it is your best guess that it was sometime in December 1957?

"Answer. Yes, sir.

"Question. When you saw them at that time at that place——"

Mr. Flannery: And then there was further colloquy.
[fol. 174] The Court: At that time there was another proceding interjected, I notice from the record.
Mr. Flannery: Yes, Your Honor, and the testimony resumes at page 273. And reading from page 273:

"ADAM H. ARTIS resumed the witness stand, and having been previously duly sworn, was examined and testified further as follows:

"By Mr. Flannery:

"Question. Now, I call your attention again to that day in December. And, as I recall your testimony, you said that you met these three defendants, Coppedge, Tyler and Alexander, around 7 p.m. and it was near Champlain Street and what other street?

"Answer. Kalorama Road.

"Question. In the District of Columbia. All right. Now, were you walking or riding in a car?

"Answer. Standing on the corner.

"Question. You were standing on the corner. And when you first saw the three people, these three defendants, what were they doing, walking or riding?

"Answer. Riding in Tyler's car, 1955 Ford, blue.

"Question. They were riding in a 1955 Ford. Who was driving that car?

"Answer. Coppedge.

"Question. The defendant Coppedge. All right. Now [fol. 175] then, the other two people I take it, were in the car with him?

"Answer. Yes, Tyler and Alexander.

"Question. Very well. Now then, what happened when you saw the three defendants at that time and place?

"Answer. Well, Alexander says he have a check. He says we can cash it if you do what I tell you to do.

"Question. Alexander told you he had a check and if you do what I tell you to do you can cash it, is that right?

"Answer. Yes, sir.

"Question. Then what happened next?

"Answer. Well, he told me what to do.

"Question. Who told you what to do?

"Answer. Alexander.

"Question. What did he tell you to do?

"Answer. Well, go in the liquor store and tell the money order come from my uncle in Roanoke Virginia and I receive them once a month.

"Question. When that was said where were you——"

Mr. Flannery: And then there was an objection, Your Honor. Shall I proceed?

The Court: Only read questions and answers, nothing else.

Mr. Flannery: Very well.

[fol. 176] "Question. When this was said to you by Alexander, where were you at that time, on the street?

"Answer. In the car.

"Question. You were in the car?

"Answer. Yes, sir.

"Question. And who else was in the car?

"Answer. Coppedge and Tyler.

"Question. Was it said in the presence of all three defendants, to you.

"Answer. Yes, sir.

"Question. Now, did anyone else say or do anything at that time?

"Answer. No one but Alexander.

"Question. What did Alexander do at that time?

"Answer. He was telling me what to do.

"Question. After he told you what to do, what happened after that?

"Answer. Well, we went to the liquor store.

"Question. And when you say we went to the liquor store, do you mean all three defendants?

"Answer. Yes, sir.

"Question. And who was driving the car?

"Answer. Mark Coppedge.

"Question. When you got to a liquor store—strike that.

[fol. 177] "Did there come a time when you got to a liquor store?

"Answer. Yes, sir.

"Question. Do you recall where that was?

"Answer. Northeast, some place.

"Question. When you got there what, if anything, happened?

"Answer. Well, I went in the liquor store and purchased two fifth of Seagram V O, six cans of beer and two packages of cigarettes.

"Question. Did you have anything with you when you went into the liquor store?

"Answer. The check.

"Question. A check?

"Answer. Yes, sir.

"Question. And from whom did you get the check?

"Answer. Alexander.

"Question. Allen Alexander. All right. I will show you what has been introduced in evidence as Government Exhibit No. 6, a Nation-Wide Money Order bearing the number D006162. Look at that Mr. Witness, front and back, and then tell me whether you can identify it."

The Court: What is the number of that exhibit?

Mr. Flannery: At this trial it is No. 3, Your Honor.

[fol. 178] The Court: No. 3?

Mr. Flannery: No. 3 for identification.

The Court: And which transaction does this refer to?

Mr. Flannery: Let me check just a second, Your Honor.

Mr. Cohen: I believe it will refer to Borak.

The Court: Borak?

Mr. Cohen: I believe, Your Honor.

The Court: Very well.

Mr. Flannery: The fifth, sixth, and seventh, Your Honor.

The Court: You may proceed.

Mr. Flannery: (Reading)

"By Mr. Flannery:

"Can you identify that, sir?

"Answer. Yes, sir.

"Question. Is that the check you took into the liquor store on that day?

"Answer. Yes, sir.

"Question. How do you identify it?

"Answer. Signature.

"Question. Your signature or endorsement on the back of it?

"Answer. Yes, sir.

[fol. 179] "Question. Now, after you purchased or received the merchandise which you have stated you did receive, what did you do with this money order, did you give it to the man in the store?

"Answer. Yes, sir.

"Question. After you gave him this money order, No. 6, and received the merchandise, did you receive anything else?

"Answer. I received the whisky.

"Question. And what else, any money?

"Answer. The balance of the money. He says come back tomorrow and get $20 more he owed me.

"Question. Who said that?

"Answer. The proprietor.

"Question. Now, when you received the money and the liquor, where did you go?

"Answer. Back to the car.

"Question. And when you went back to the car who was in the car at that time?

"Answer. Coppedge and Tyler and Alexander.

"Question. Now, what did you do when you went back to the car?

"Answer. I gave Coppedge the money.

"Question. You gave Coppedge the money?

"Answer. Yes, sir.

[fol. 180] "Question. Very well. And what did you do with the liquor?

"Answer. Well, I put it in the car.

"Question. Now, after that happened, after you gave Coppedge the money and put the liquor in the car, did you do anything else?

"Answer. Yes.

"Question. What did you do?

"Answer. Well, Allen got a fifty money order and we went to a store up on 14th Street.

"Question. Allen got a $50 money order.

"The Court: He did what?

"Mr. Flannery: Allen.

"By Mr. Flannery:

"Question. By Allen, do you mean Allen Alexander?

"Answer. Yes, sir.

"Question. Got a $50 money order?

"Answer. Yes, sir.

"Question. And what did he do?

"Answer. He asked me for my I D card and I gave it to him so he filled my name on it.

"Question. After that was done then what happened?

"Answer. We goes in the grocery store and we purchase some groceries.

"The Court: When he said 'we,' I wonder who 'we' [fol. 181] are?

"Mr. Flannery: Yes.

"By Mr. Flannery:

"Question. Who went in the grocery store?

"Answer. Allen went with me.

"Question. Allen?

"Answer. Alexander.

"Question. Allen Alexander went with you?

"Answer. Yes, sir.

"Question. Where did the other two people go?

"Answer. They was in the car.

"Question. And by the other two people you mean Tyler and Coppedge?

"Answer. Yes, sir.

"Question. Remained in the car? Very well. Now when you went—strike that.

"Do you recall where this grocery store was?

"Answer. On 14th Street. The exact number I don't know.

"Question. In the District of Columbia?

"Answer. Yes, sir.

"Question. When you and Allen Alexander went into the grocery store, what happened?

"Answer. Well, I purchased some groceries and I presented my check to the owner. And he says, 'Oh, yes, some [fol. 182] checks been stolen on 14th Street' and picked up the receiver and Alexander and myself we ran out of the store.

"Question. You ran out of the store?

"Answer. Yes, sir.

"Question. And did you leave the money order there?

"Answer. Yes, sir, and my identification card.

"Question. Now, Mr. Witness, I will hand you Government Exhibit 4, a Nation-Wide money order bearing the number D006188."

The Court: Now, which transaction does that relate to?

Mr. Flannery: That is counts 3 and 4, Your Honor, the Gevinson matter. And the Gevinson check in this case is Government Exhibit 2 for Identification.

The Court: You may proceed.

Mr. Flannery: (Reading)

"Look at that, will you please, and tell me whether that is the money order which you presented to the grocer and which you left there after you ran out of the store after he called the police.

"Answer. Yes, sir.

"Question. That is it?

"Answer. Yes, sir.

"Question. After you ran out of the store after attempting to pass that money order, where did you go?

[fol. 183] "Answer. I went back to 2300 of Champlain Street where I was living at the time.

"Question. And where did you go after that?

"Answer. I went to bed.

"Question. Sir?

"Answer. Bed.

"Question. Now, for the next few days where did you stay?

"Answer. Well, I got up the next morning and got up looking to drink and saw somebody that knew me.

"Question. Did you drink a little bit at that time?

"Answer. Yes, sir, plenty.

"Question. Where did you stay for the next few days?

"Answer. Well, someone says the police——

"Question. Not what anyone said. Did you stay somewhere?

"Answer. Yes, sir.

"Question. With someone.

"Answer. Yes.

"Question. Who?

"Answer. Jimmy Hudson.

"Question. Did there come a time after what you have told the Court and the jury about, that you saw Mark Coppedge again?

[fol. 184] "Answer. Yes, sir.

"Question. And did you have any conversation with him about checks?

"Answer. No.

"Question. Did he say anything to you?

"Answer. No, he did not.

"Question. Did Mark Coppedge ever mention anything to you later on?

"Answer. Yes, he says he will get me away.

"Question. He said he would 'Get you away?'

"Answer. Yes, sir.

"Question. And did he say anything else?

"Answer. No, sir, only he give me money to get wine with.

"Question. He gave you money to get wine?

"Answer. Yes, sir.

"Question. Then did there come a time when you left town?

"Answer. Yes, sir, I left a couple days after then. I commenced getting sick and turned in to the hospital at Perry Point Maryland.

"Question. Are you a veteran?

"Answer. Yes, sir.

"Question. And you have been sick, haven't you?

"Answer. Yes, sir.

[fol. 185] "Question. Did there come a time when you got out of the hospital?

"Answer. Yes, sir.

"Question. And did you go somewhere?

"Answer. I went home, North Carolina with my mother.

"Question. With your mother?

"Answer. Yes, sir.

"Question. And did you stay there with her until last week, wasn't it?

"Answer Yes, sir, when I was picked up.

"Question. And did the police and the FBI pick you up about two weeks ago?

"Answer. At home, yes, sir.

"Question. And were you asked by the law enforcement officials what you knew about this case?

"Answer. Yes, sir.

"Question. Did you tell the FBI and the police what you knew?

"Answer. Yes, sir.

"Question. Did anyone make any promises to you?

"Answer. No, sir.

"Question. Has anyone made any promises or threats to you today——

"Answer. No, sir.

"Question. —for your testimony?

[fol. 186] "Answer. No, sir.

"Question. What you have told us is the truth?

"Answer. Yes, sir.

"Mr. Flannery: That is all.

"Cross-examination."

The Court: Just a moment. You don't have to read the cross-examination. You may, if you wish, but if you do it you adopt it as your own. If Mr. Cohen wants to read the cross examination, he has a right to, or any part of it. If there is anything in the cross examination that you want to adopt, you can read those portions of it.

Mr. Flannery: May I have just a moment to glance at this?

The Court: Yes, surely.

Mr. Cohen: Your Honor, may we approach the bench?

The Court: Yes, indeed.

(At the bench:)

Mr. Cohen: I simply want to ask if I have the right to have it all read.

The Court: No, You don't. Either side can read any portion that it wishes.

Mr. Cohen: I just thought it would make it easier.

The Court: You have a perfect right to read any part that Mr. Flannery does not read. You can read all that

[fols. 187-190] he does not read or you can read any part of it, but whichever counsel reads a part of the testimony adopts it.

Mr. Cohen: Sure, I see.

The Court: In other words, this is just as though the witness was on the witness stand, and it is the same way in reading a deposition.

Mr. Cohen: Of course, I would like to have it all in.

The Court: You have a perfect right to read the rest of this, either all or none or any part of it that you choose.

Mr. Cohen: Since I don't have a copy to follow, if you read parts of it, I am sure you will indicate the pages.

The Court: There will be no difficulty about that.

* * * * * * *

[fol. 190a] Reporter's Certificate to foregoing transcript omitted in printing.

[fols. 191-192] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

Washington, D. C.

Transcript of Proceedings—March 4, 1960

* * * * * * *

[fol. 193] PROCEEDINGS

The Deputy Clerk: The case of the United States versus Mark Coppedge. Mr. Flannery, Mr. Cohen.

The Court: Mr. Flannery, I believe that you concluded the reading of such parts of the deposition of Artis as you wished to read, or are there any other parts that you wish to read?

Mr. Flannery: There are no other parts that I wish to read, Your Honor.

I will make this transcript available to defense counsel.

The Court: Do you wish to read any portions of the cross-examination, Mr. Cohen?

Mr. Cohen: Yes, Your Honor.

The Court: If you do, you do so. May I make this suggestion to you, however: I suggest that you be more or less selective. Don't read repetitious and immaterial matter. Select only those matters that you think will be relevant.

Mr. Cohen: I haven't had an opportunity to really scan it.

The Court: Why not? You have had — since yesterday.

Mr. Cohen: I had the opportunity, but I haven't availed myself of it, Your Honor.

The Court: Very well.

[fol. 194] READING OF PORTIONS OF TESTIMONY OF ADAM ARTIS AT A PRIOR PROCEEDING INTO RECORD

Mr. Cohen: This will be the cross-examination of Mr. Artis, and this was by a Mr. Dietz. He was the attorney who represented someone in a prior proceeding.

The Court: What page?

Mr. Cohen: I am sorry, Your Honor. Page 284.

(Thereupon, Mr. Cohen read the cross-examination of Adam Artis, as follows:)

"Question: Mr. Artis, did you sign a statement for the FBI?"

"Answer: Yes.

"Mr. Dietz: May I have that statement?"

The Court: No, no. Don't read colloquies. Read only questions and answers.

Mr. Cohen: Yes, Your Honor.

The Court: Don't read anything that the counsel or the Court may have said.

Mr. Cohen: I see, Your Honor.

The Court: In other words, when you read the prior testimony of a witness, or read his deposition, it is just as though the witness were on the witness stand.

Mr. Cohen: Yes, Your Honor.

"Question: Now, Mr. Artis, were you in the Psychiatric Ward at Perry Point Hospital?

"Answer: No."

Mr. Cohen: Should I read Q and A each time, Your [fol. 195] Honor? Would that be clearer?

The Court: Oh, no, no. That isn't necessary.

(Thereupon, Mr. Cohen omitted reading "Question" and "Answer." However, for purposes of clarity, they are herewith incorporated in the transcript.)

"Question: You said you were sick.

"Answer: Medical.

"Question: You said you were sick. What was your illness there?

"Answer: Well, leukemia.

"Question: What was the date that you say you met Mark Coppedge and these other boys at Kalorama Road?

"Answer: The exact date I don't know, but it was in September—December.

"Question: You say it was in December. Was it a clear day?

"Answer: Snowy.

"Question: Pretty cold?

"Answer: Snowing, yes.

"Question: How were you dressed? Did you have an overcoat on?

"Answer: Yes.

"Question: And were you just standing out on the street corner when they came by?

"Answer: Yes.

[fol. 196] "Question: Were you drinking that day?

"Answer: Yes, sir.

"Question: Do you remember what you drank that day?

"Answer: Plenty wine and whisky.

"Question: You drank plenty of wine and whisky too?

"Answer: Yes.

"Question: Did you drink that every day in December?

"Answer: Yes.

"Question: Would you say you were pretty high on this particular day?

"Answer: Yes, I was.

"Question: And did you ride in the back seat of the car or in the front seat of the car?

"Answer: In the back.

"Question: When you said that you got this money order

or check from Allen Alexander, did you know the check was stolen?

"Answer: No, I did not.

"Question: So, there was no conversation—anybody in the car didn't say this is a stolen check or anything like that?

"Answer: No, they did not.

"Question: And Allen Alexander put your name on the check, is that correct?

"Answer: Yes.

[fol. 197] "Question: And then you signed it on the back when you got into the store, did you not?

"Answer: Yes.

"Question: When you came back to the car did you give the money to Allen Alexander, the change from the money order?

"Answer: No.

"Question: Do you remember talking with me in the cellblock when you were first brought up here the other day? Do you remember talking with me in the cellblock behind this very court?

"Answer: Yes.

"Question: Do you remember on that day I asked you about this case and do you remember telling me that you got the check or money order from Allen Alexander and giving him the money, the change? Do you remember that?

"Answer: I can't recall that.

"Question: Well, you said there were no promises made to you by the FBI or any threats?

"Answer: No.

"Question: Do you remember telling me back here in the cellblock that you had been told that you would either plead guilty to forgery in this case or else that you would be charged with housebreaking?

"Answer: No.

[fol. 198] "Question: You don't remember telling——"

The Court: I am going to ask counsel to come to the bench.

(At the Bench:)

The Court: It occurs to the Court, gentlemen, that neither counsel should read questions which ask the witness whether he remembers this or that to which the answer is "No,"

because then counsel is indirectly planting thoughts in the jury's mind for which there is no basis.

Mr. Cohen: If Your Honor please, I intend to call Mr. Dietz as a witness to testify to the particular conversation that he had with Mr. Artis.

The Court: Very well. You may read the testimony.

Mr. Cohen: As to this material.

The Court: You may do so. Very well.

Mr. Cohen: Thank you.

(Counsel Having Returned to Trial Tables.)

The Court: You may proceed, Mr. Cohen.

"Question: Do you remember on that day I asked you about this case and do you remember telling me that you got the check or money order from Allen Alexander and giving him the money, the change? Do you remember that?

"Answer: I can't recall that.

"Question: Well, you said there were no promises made to you by the FBI or any threats?

[fol. 199] "Answer: No.

"Question: Do you remember telling me back here in the cellblock that you had been told that you would either plead guilty——"

Mr. Cohen: Your Honor, I apologize. I am reading this material twice.

The Court: Yes, you read that.

Mr. Cohen: I apologize. I apologize to the jury also. I'll go right ahead.

"Question: You don't remember telling me that?

"Answer: No.

"Question: Do you deny that you said that to me?

"Answer: Yes, they used no force on me.

"Question: I am not asking you whether anybody used force. I am asking you what you said to me, Mister, right back here in this cellblock. Do you recall saying that to me or not?

"Answer: No, I didn't.

"Question: Well, you remember telling me that you didn't know that the check was stolen?

"Answer: Yes.

"Question: Do you remember telling me that all you did was sign your own name to a check that you didn't — was stolen? Now, do you remember that?

"Answer: Yes.

[fol. 200] "Question: You remember that part. Now, do you remember that you told me that Alexander gave you the check and you gave the money back to Alexander, the change? Now, do you remember it?

"Answer: I can't recall.

"Question: Well, you weren't drunk when you were talking to me in the cellblock?"

Mr. Flannery: I wonder if I might see the transcript——

The Court: Are you objecting?

Mr. Flannery: Your Honor, we have only one transcript which we are sharing. I would like to see it.

The Court: You may look over Mr. Cohen's shoulder, if you wish.

Mr. Flannery: If he would just mention the page numbers, that would be sufficient for my purposes, Your Honor, as he reads.

The Court: I will sustain the objection. As a matter of fact, it was sustained on a prior occasion, and the question was withdrawn. Don't read questions that are withdrawn.

Mr. Cohen: I couldn't tell, Your Honor; it was at the bottom of the page. I try to look ahead.

The Court: You should have read that and marked it up. When counsel is going to read something into evidnce, he [fol. 201] ought to go over it in advance and see what parts should be read.

Mr. Cohen: I appreciate that, Your Honor. I should have.

The Court: You may proceed.

"Question: You said, did you not, sir, that there was no conversation, any mention that these checks were stolen while you were in the car?"

The Court: I am going to exclude that on the ground that it is repetitious. We have had that three times.

"Question: As I understand it, all that Mark Coppedge did was drive this car to two different places when you went in to cash checks?

"Answer: Yes."

Mr. Cohen: Now, I am at Page 289. This is still Mr. Dietz cross-examining——

The Court: Proceed. Do nothing but read questions and answers, Mr. Cohen.

"Question: Mr. Artis, this car that you say you rode in on this snowy Saturday in December, was that Mark Coppedge's car?

"Answer: Tyler's car.

"Question: Had you ever seen Tyler ride in that car before?

"Answer: Yes, sir, I have.

[fol. 202] "Question: But it was not Mark Coppedge's car?

"Answer: No, it wasn't.

"Question: Now, can you tell us how much you had to drink on that day, that morning before you say you met these men in the car?

"Answer: I was pretty well intoxicated.

"Question: Would you say you were drunk?

"Answer: I had drinked plenty.

"Question: Well, were you intoxicated or drunk enough that you could possibly have been mistaken as to who was in the car?

"(Brief pause)

"Answer: Oh, yes, I was drinking.

"Question: Now, could you have been mistaken as to whether Mark Coppedge was the driver of that car.

"Answer: Yes, he was driving.

"Question: No, you didn't understand my question I am afraid. Could you have been mistaken as to whether it was Mark Coppedge who was driving the car?

"(Brief Pause)

"Answer: It's been so long and I was drinking. But he was driving when he picked me up.

"Question: Did Mark Coppedge tell you to do anything regarding these checks or anything else that day?

"Answer: No, he did not.

[fol. 203] "Question: I didn't hear your answer, sir.

"Answer: No, he did not.

"Question: Now, this statement that you made out or

you signed for the FBI when you were arrested in Wilson, North Carolina, did you write this statement out or did the FBI Agent write it out for you?

"Answer: The Agent.

"Question: The FBI Agent wrote it for you?

"Answer: Yes.

"Question: Did you read this statement before you signed it?

"Answer: They read it to me."

The Court: You may read the Court's question and the witness's answer.

Mr. Cohen: Thank you, Your Honor.

"The Court: Did they first ask you questions and did they write down the answers?

"The Witness: Yes, your Honor."

Mr. Cohen: This is by counsel now; not the Court.

"Question: Did they make any other statements for you to sign?

"Answer: No.

"Question: Then this is the only statement that you signed for the FBI?

"Answer: Yes.

[fol. 204] "Question: Was everything in this statement, as the FBI transcribed it, was everything just the words that you had said and what they had written down what you had said?

"Answer: Yes.

"Question: Did you tell the FBI that you had a high school education?

"Answer: Yes.

"Question: You did?

"Answer: Yes.

"Question: I show you now Defendant's Exhibit No. 4 for identification which purports to——"

The Court: Just a moment. I think that you should omit the rest of page 292 to the bottom of page 293, because that statement was excluded at the moment.

You may resume, if you wish, at the bottom of page 293.

Mr. Cohen: I think I had better. This is by counsel.

"Question: After seeing this statement would this refresh your recollection as to what the FBI read to you when you said they read you this statement about your degree of education?

"Answer: I beg your pardon?

"Mr. Dietz: I don't think the witness understood me."

The Court: No, no, no. Please don't read anything but [fol. 205] the questions and answers.

"Question: Did you tell the FBI—and you said they read back this statement to you before you signed it—and did they read back to you from this statment, 'I attended five grades of grammar school in Eureka, Wayne County, North Carolina?'

"Answer: Yes.

"Question: You did.

"Answer: Yes.

"Question: Is five grades of grammar school a high school education?

"Answer: That's what I told them.

"Question: But that was incorrect?

"(Witness nods head)

"Question: When the FBI read that back to you, did you tell them that was incorrect?

"(Brief pause)

"Question: Do you understand me?

"Answer: Yes.

"Question: Did you tell the FBI it was incorrect when they read it back to you before you signed it?

"Answer: No."

The Court: I am going to interrupt before the next question is read.

Mr. Cohen: Oh, yes.

[fol. 206] The Court: There was a colloquy, and the Court directed the question to be reframed. So you may omit the next question, and you may resume at page 207, where the testimony starts again.

Mr. Cohen: All right, Your Honor.

By counsel:

"Question: Mr. Artis, so that there is no mistake, just to inquire as to how this statement came into being, did you talk with the FBI agents and then they wrote down a statement for you based on what you had told them and then read the statement to you and you signed it?

"Answer: No.

"Question: Did not?

"Answer: Yes.

"Question: What happened? How was the statement made?

"Answer: Well, they came in jail and got me and told me just what happened.

"Question: They told you what happened. Yes.

"Answer: And that's the statement I signed.

"Question: All right. Thank you."

The Court: You may read the Court's questions and the witness's answers, if you wish.

"The Court: Did they ask you any questions?

"The Witness: No, sir, your Honor.

[fol. 207] "The Court: Did they ask you to tell them what happened?

"The Witness: Yes, sir.

"The Court: They asked you to tell them what happened?

"The Witness: Yes, sir.

"The Court: And you told them?

"The Witness: Yes, sir.

"The Court: And after that they wrote out a statement as to what you told them?

"The Witness: Yes, sir.

"The Court: And then they handed it to you?

"The Witness: They was writing it out while I was telling them.

"The Court: In other words, this statement is what you told the FBI?

"The Witness: Yes, sir.

"The Court: I see."

Mr. Cohen: I am now at page 299.

The Court: What page, Mr. Cohen?

Mr. Cohen: Page 299, Your Honor. At the middle of the page.

"Question: You have also related that you received this money order from a party named Allen Alexander and you have also told us that Coppedge told you nothing and didn't [fol. 208] say anything at all and yet you say that you returned——"

Mr. Cohen: I am sorry, Your Honor. I wasn't looking ahead.

The Court: Yes, I think that the question is argumentative.

Mr. Cohen: Argumentative.

"Question: When you got the money order from Allen Alexander and cashed it, did you not return the money, the balance of the change to Alexander and not to Mark Coppedge?

"Answer: That's right."

The Court: You may read the Court's question.

"The Court: Let us see. Did you return the money to Alexander or to Coppedge?

"The Witness: To Coppedge."

Mr. Cohen: By counsel:

"Question: Could you be mistaken as to that point?

"(Brief pause)

"The Court: ——"

if I may, Your Honor——

"The Court: The question is, could you be mistaken?

"The Witness: No."

Mr. Cohen: May I read the Court's question?

The Court: You may read the Court's question.

[fol. 209] "The Court: I am going to interject a question, if I may. You were not too drunk to be able to go into the store and cash the check, is that right?

"The Witness: No, sir.

"The Court: You were not so drunk but that you could do it?

"The Witness: Yes, sir."

Mr. Cohen: Question, by counsel:

"Question: You have stated, Mr. Witness, that you went to Jimmy Hudson's basement to live. Had you ever gone to Jimmy Hudson's basement to stay prior to this last time that you related here in Court? Do you understand me?

"Answer: No, I don't.

"Question: To clarify it then. Do you know who Jimmy Hudson is?

"Answer: Yes.

"Question: Had you ever stayed at Jimmy Hudson's basement, stayed at his apartment down there?

"Answer: Before this happened?

"Question: Yes.

"Answer: Yes, I have.

"Question: About how many times had you stayed there?

"Answer: A week or something like that. I helped him [fol. 210] with the furniture.

"Question: I say how many times prior to this time that you stated here in Court today had you stayed at Jimmy Hudson's place? Were you there quite a few times or once or twice or how many times had you slept there at his place?

"Answer: Quite a few times.

"Question: And he was a friend of yours?

"Answer: Yes.

"Question: Did you see Mark Coppedge hand the money that you gave him to Allen Alexander?

"Answer: Yes, I gave it to Coppedge.

"Question: No, I asked you if you saw Mark Coppedge hand the money to Allen Alexander?

"Answer: I did not.

"Question: Let me ask you this. When you handed the money to Mark Coppedge, were you outside the car or inside the car?

"Answer: I was outside the car.

"Question: And was Allen Alexander outside the car or inside the car?

"Answer: He was inside the car.

"Question: And was Allen Alexander sitting on the same side of the car as Mark Coppedge was sitting?

"Answer: Now, that I can't recall.

[fol. 211] "Question: Do you know where Allen Alexander was sitting at the time that you handed the money to Mark Coppedge?

"Answer: Do not.

"Question: But you know he was in the car?

"Answer: Yes.

"Question: How long did you stay at Jimmy Hudson's apartment the last occasion that you stayed there?

"Answer: Two nights. And I got sick and turned into the hospital at Perry Point, Maryland."

Mr. Cohen: This is further cross-examination, at page 304, if the Court please.

"Question: Mr. Witness, as I understand your testimony, you were a party to passing two money orders, is that correct?

"Answer: Yes, sir.

"Question: Could you speak loud enough so the Reporter can hear you?

"Answer: Yes, sir.

"Question: And those are the only two, is that correct?

"Answer: Yes, sir.

"Question: As I understand it, one of them was passed to a Morris Gevinson? Does that name ring a bell to you? On December 2.

[fol. 212] "Answer: Well, one was passed at the whisky store and I tried to pass one at the grocery store up on 14th Street but the man's name I cannot recall."

Mr. Cohen: Toward the bottom of the same page, Your Honor.

"Question: Now, it's your testimony, as I understand it, and correct me if I am wrong, that Allen Alexander made out both of these money orders, is that correct?

"Answer: Yes, sir.

"Question: He wrote them out in front of you? You saw him write them, is that correct, sir?

"Answer: No, he wrote the second one that I took in the grocery store.

"Question: And was the second one the one that you weren't able to sign yourself?

"Answer: Yes, sir.

"Question: In other words, he wrote the one that you were not able to sign? You saw him write that one?

"Answer: Beg your pardon?

"Question: The one that you did not sign yourself, you say that you saw Allen Alexander write that?

"Answer: Yes, he had my I D card.

"Question: In other words, the face of this second one, the one which you have not signed is made out in Allen [fol. 213] Alexander's handwriting, is that correct, sir?

"Answer: That's right.

"Question: And on the face of that is your name and who it's from and the address of the person who it's from, is that correct?

"Answer: Yes, sir.

"Question: But you definitely remember seeing him——"

Mr. Cohen: And if I may interject, the reference is to Allen Alexander. This is at page 309.

"Question: But you definitely remember seeing him sign the name Adam H. Artis?

"Answer: Yes, I do.

"Question: Where did he get the pencil or pen?

"Answer: He had that.

"Question: Which was it?

"Answer: I gave him my I D card.

"Question: Which was it, a pencil or a pen?

"Answer: He was writing. It was a pen.

"Question: He was writing with a pen. Was it a ball point pen or was it an ink pen?

"Answer: To that I can's recall.

"Question: You don't remember. All right. You had no knowledge at that time that this was a stolen money order, did you?

The Court: We have had that four or five times already. [fol. 214] Mr. Cohen: All right. If Your Honor please, may I ask if I may read at page 310?

The Court: Yes.

Mr. Cohen: Beginning with the second question on the page.

The Court: Very well.

"Question: Then you went into the store with Government Exhibit No. 6, is that correct?"

Mr. Cohen: May we, for the edification of the jury, Your Honor, indicate that Exhibit 6 was one of the money orders?

The Court: What was it?

Mr. Cohen: One of the money orders. I am not sure which.

The Court: Yes. Yes, I think that is proper. Was that the check that was presented at Gevinson's store?

Mr. Cohen: I am not sure, Your Honor.

Mr. Flannery: I am not sure, Your Honor.

The Court: Perhaps it is not material at the moment.

Mr. Cohen: I don't believe it is, but I believe it was the Gevinson check, to keep the record straight.

Mr. Flannery: The Gevinson check was Number 2 in this case.

[fol. 215] The Court: Was what, Mr. Flannery.

Mr. Flannery: The Gevinson check was Number 2 for identification in this case.

The Court: That is what I thought.

You may proceed, Mr. Cohen.

Mr. Cohen: Thank you, Your Honor.

"Question: Then you went into the store with Government Exhibit No. 6, ——"

which is our Exhibit No. 2——

"——is that correct?

"Answer: Yes.

"Question: And you got certain money for that, did you not?

"Answer: Yes.

"Question: And at the time you did that you had no knowledge that it was stolen, did you?

"Answer: I did not."

The Court: I am going to exclude that. We have had that a half a dozen times, that he didn't know that it was stolen. Let's not repeat.

Mr. Flannery: May I say this, Your Honor: If it appears that he got money, it was not the Gevinson check. It must have been the Borak check, because the Gevinson check is where he left the store, as I recall it; he didn't get money.

The Court: The two checks concerning which Artis testi-
[fol. 216] fied, one was the Gevinson check, and what was the other one?

Mr. Flannery: The other one was the Borak check, Your Honor.

The Court: You may proceed.

Mr. Cohen: I think this refers, Your Honor, just to clarify it, to the Gevinson transaction——

The Court: That was what I understood Mr. Flannery to say.

Mr. Flannery: I will drop that point, Your Honor.

The Court: Will you check on that? We want to be absolutely sure.

Mr. Flannery: Well, Your Honor, the Gevinson check is where he left the check in the store and didn't get any money. It would appear from counsel's reading of the testimony that he is referring to an incident where he did secure money. In that event, it would be the Borak check, which is Government Exhibit No. 3 in this case.

Mr. Cohen: I was wrong, Your Honor. That is correct.

The Court: Very well.

Mr. Cohen: Your Honor, can we indicate that there is a stipulation as to the date of Mr. Artis's arrest?

The Court: You may read that, if you wish.

Mr. Cohen: That was stipulated to be——

[fol. 217] The Court: Just below the middle of page 311.

Mr. Cohen: That was the 25th of November—of what year? Was that 1957?

Mr. Flannery: 1958.

The Court: No, not 1957. 1958.

(Brief pause. Counsel conferred inaudibly.)

The Court: Yes. 1958.

Will counsel come to the bench.

(At the Bench:)

The Court: This case first came to trial on the 18th of November, 1958, and it did not conclude until the 8th of December. Apparently, Artis was arrested while the trial was in progress.

Mr. Flannery: That is right.

Mr. Cohen: Is that what happened? I see.

Mr. Flannery: Yes, Your Honor.

(Counsel Having Returned to Trial Tables.)

Mr. Cohen: To clarify that, Your Honor, ——

The Court: They were asked to stipulate the date on

which Artis was arrested. It was November 25th, 1958, is that correct?

Mr. Flannery: Yes, Your Honor.

The Court: Very well.

Mr. Cohen: I am reading from page 312, and this has to do with his arrest.

[fol. 218] "Question: And at the Wilson County jail did they then tell you what you were arrested for?

"Answer: They did not.

"Question: You were arrested on the 25th of November by stipulation. Take our word for that. What time of day were you arrested?

The Court: Well, the question was answered on page 315.

Mr. Cohen: All right, Your Honor.

"Answer: It was in the afternoon.

"Question: In the afternoon of the 25th, and you were taken to the Wilson County jail. And up until this time you had no knowledge of what you were charged with, is that correct?

"Answer: Yes, sir.

"Question: After the day you were arrested, how many days went by before you found out what you were charged with? In other words, how long were you in jail before you knew what you were there for? Do you know?

"Answer: No, sir, I do not.

"Question: In other words, was it more than one day?

"Answer: I was there a week.

"Question: They never told you what you were arrested for?

"Answer: That's right.

[fol. 219] "Question: Didn't you know——"

Mr. Cohen: Your Honor, may I read the next question. I would ask the Court first.

The Court: Yes.

"Question: Didn't you know that you were charged in a 16 count indictment up here in Washington for forgery and uttering and housebreaking and grand larceny? Did you ever know that?

"(Brief pause)

"Question: Could you answer my question, sir, or do you understand my question?

"Answer: Yes.

"Question: Could you answer it then?

"Answer: Yes, sir, they said forgery."

Mr. Cohen: I will skip to page 317, the middle of the page.

The Court: Very well.

"Question: Were you ever told that you were wanted back here in Washington for forgery of more than one check, the uttering of more than one check and the interstate transportation of stolen checks? Were you ever told that?

"Answer: No, sir.

"Question: You never knew that?

"Answer: No, sir.

[fol. 220] "Question: Did you know that when you came to Court here yesterday?

"Answer: No, sir."

Mr. Cohen: At the middle of page 318, if the Court pleases.

"Question: You pleaded guilty in this case, in this courtroom this week, didn't you? Do you know what a plea of guilty is?

"Answer: Yes.

"Question: Did you plead guilty here?

"Answer: For cashing one money order.

"Question: To one count?

"Answer: That's right.

"Question: That's right, isn't it?

"Answer: That's right.

"Question: And your plea of guilty was to passing one of these checks, wasn't it?

"Answer: That's right.

"Question: Well, now, you told me a few minutes ago and you told Mr. Dietz that you didn't know these things were stolen and you only signed your name to them. What did you plead guilty for?

"Answer: Well, I pleaded guilty to what I done."

Mr. Cohen: I am now reading, if Your Honor please, about two-thirds down, on page 319.

[fol. 221] "Question: Now, do you know what you pleaded guilty to doing, Mr. Witness?"

"Answer: No, sir.

"Question: You don't know what you pleaded guilty to doing?

"Answer: Yes.

"Answer: Guilty to cashing one of the money orders."

Mr. Cohen: May we approach the bench, Your Honor?

The Court: Yes, indeed.

(At the Bench:)

Mr. Cohen: Your Honor, since we here read from the cold page, I would here request permission to read to the jury the colloquy.

The Court: What colloquy?

Mr. Cohen: The colloquy which appears between the Court and the District Attorney. It is on page 320.

The Court: Oh, no.

Mr. Cohen: I am mistaken——

The Court: No, no. I will exclude that.

Mr. Cohen: Wait—that isn't where I meant. I'm sorry, Your Honor. At the bottom of page 321 is what I have reference to, on the following page.

The Court: What do you want to read?

Mr. Cohen: The question from the Court to Mr. Flannery [fol. 222] on page 322, the first full paragraph, "To what extent,——"

The Court: I see.

Mr. Flannery: I would object to that, Your Honor.

The Court: Objection sustained.

Mr. Cohen: And the response. You have ruled—I appreciate that. May I say something more?

The Court: You cannot read my comments.

Mr. Cohen: I respectfully——

The Court: I see your point. I can see your point.

Mr. Cohen: You can? Fine.

(Counsel Having Returned to Trial Tables:)

The Court: That seems to conclude Artis's testimony.

Mr. Cohen: Yes, Your Honor. I wanted to be sure.

Mr. Flannery: I have nothing further, Your Honor.

* * * * * * *

[fol. 223] GOVERNMENT RESTS

Mr. Flannery: The Government will rest its case, Your Honor.

The Court: Will counsel come to the bench, please.

(AT THE BENCH:)

The Court: As to counts eleven, twelve, thirteen, fourteen, fifteen and sixteen, a review of my notes indicates that the Government did not offer any evidence in support of those counts, is that correct?

Mr. Flannery: Those counts were disposed of at the first trial, Your Honor.

The Court: Oh, yes. I directed a judgment of acquittal as to counts eleven through sixteen.

Mr. Flannery: Yes, Your Honor.

The Court: So they are out.

MOTION FOR A JUDGMENT OF ACQUITTAL, ETC., AND DENIAL THEREOF

Mr. Cohen: At this time, of course, I would make what is sometimes euphemistically called the usual motions. I make them in all seriousness, and I make them as regards to all counts.

[fol. 224] The Court: You are making a motion for a judgment of acquittal?

Mr. Cohen: Yes, I am.

The Court: Motion denied.

* * * * * * *

[fol. 225] Mr. Cohen: Your Honor, prior to trial, and [fol. 226] prior, at least to the testimony of Officer Lyons, and particularly of the witness McCall yesterday——

The Court: Yes.

Mr. Cohen: —I had no intimation that the search and seizure was unlawful.

The Court: Oh, yes, you did. You had the record of the prior trial.

Mr. Cohen: As I understood——

The Court: The testimony on that issue is the same.

Mr. Cohen: At this time, Your Honor, I would make a motion for a judgment of acquittal based on the fact that

even though the evidence has not been suppressed, that the evidence was illegally obtained.

The Court: You have made a motion for a judgment of acquittal, and I have denied it. Now you are making a motion to suppress this particular evidence, and I am going to deny it, because under Rule 41(e), such a motion must be made before the trial unless the Court, in its discretion, permits it to be made at the trial, and the Court does not think that the interests of justice would require it to exercise its discretion in that respect.

Mr. Cohen: Last evening I had occasion, in order to clarify my thinking on what "paranoid" is—incidentally, may I interrupt myself—do you have the telegram from the doctor regarding Artis's condition, if I might see that?

. . . . . .

[fol. 227] Mr. Cohen: I see. I had occasion to consult by telephone last evening with Dr. Harold Stevens.

The Court: What is your point?

Mr. Cohen: I have a very high regard for Dr. Harold Stevens.

The Court: What is your point, Mr. Cohen?

Mr. Cohen: My point is that from this description that I gave him, as I recalled it, and I was fairly accurate, accurate enough, I assure the Court, of the mental condition of Mr. Artis to tell Dr. Stevens by 'phone—I repeat his conversation to me—it would appear that this had been or most probably, depending on the exact diagnosis, a long standing condition, that that condition would exist for longer than a period of a year.

The Court: It had to start sometime.

Mr. Cohen: Yes, Your Honor.

The Court: He wasn't born with it.

Mr. Cohen: No, Your Honor.

The Court: What is your point?

Mr. Cohen: My point is that I should be given opportunity to have psychiatric evidence adduced in my case in chief.

[fols. 228-232] The Court: I do not know what you mean.

Mr. Cohen: Call a psychiatrist.

The Court: You have a right to call him.

Mr. Cohen: And ask him——

The Court: No psychiatrist would be willing to express

an opinion on the basis of this telegram as to how long this illness had existed. I am quite sure that any psychiatrist would probably say that this is not the kind of illness that comes on overnight; that probably it had existed for some-time and was gradually increasing. It starts with very little and gradually grows, and takes a long period to grow. I do not think that he would be in a position, on the basis of this telegram, without any symptoms being given to him, to state whether it had existed for two years, three years, one year or five years. But, in any event, what are you asking the Court to do?

Mr. Cohen: May I ask two things of the Court: I think that the Court has granted permission, although I might not be right, in view of the later remarks,—before I commit the psychiatrist, may I ask permission to bring the psychiatrist to testify, based on this, or in the alternative——

The Court: You do not need the Court's permission. If the testimony is tendered and an objection made, I will rule at that time.

* * * * * * *

[fol. 233] Mr. Cohen: One final thing: Tom, have you gotten the statement of Adam Artis? You were going to.

Mr. Flannery: Did I say I was going to send for it?

Mr. Cohen: You said you were going to send for it from the authorities in Carolina.

Mr. Flannery: I will get in touch with the F.B.I. It may [fols. 234-338] well be that there is a handwritten statement of Artis in North Carolina.

The Court: They would have a copy of it. It is not in your file?

Mr. Flannery: There may be a copy in the file.

The Court: Make it available to Mr. Cohen, if it is.

Mr. Flannery: Very well, Your Honor. I will at least get a copy of it.

(Thereupon, at 11:15 a.m., the Court recessed.)

* * * * * * *

[fol. 339a] Reporter's Certificate to foregoing transcript omitted in printing.

[fols. 340-341] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

Washington, D. C.

Transcript of Proceedings—March 7, 1960

• • • • • • •

[fols. 342-350] (AT THE BENCH:)

The Court: The Court has been handed by the Clerk a telegram, addressed to the District Court of the United States. It is dated Perry Point, Maryland. As I interpret this, it is March 5th, 2:33 p.m. The date is not too important. The telegram reads as follows:

> "Reference Subpena case of U.S. vs Monk Coppedge to present medical records of Adam Artis in Court on 3/7/60 at Ten AM all medical records of Adam H. Artis transferred to VA Hospital Durham NC on 7/28/58 and not available to this Hospital
>
> "James Toon Acting MGR VAH."

Let this be filed.

The Deputy Clerk: Yes, Your Honor.

• • • • • • •

[fols. 351-353] Mr. Cohen: Remember yesterday afternoon we were discussing, Mr. Flannery was good enough to seek to obtain from Carolina a statement given by Mr. Artis.

Mr. Flannery: We expect it shortly. I conferred with F.B.I. Agent Woods about that statement. He had set the machinery in motion.

The Court: In other words, the statement is available?

Mr. Flannery: We expect it here shortly.

• • • • • • •

[fol. 354] STANLEY MARTIN DIETZ, called as a witness in behalf of the defendant, being first duly sworn, was examined, and testified, as follows:

Direct examination.

By Mr. Cohen:

[fol. 355] The Court: You may proceed.

Mr. Cohen: Thank you, Your Honor.

Q. (By Mr. Cohen) Would you state your full name, please?

A. Stanley Martin Dietz.

Q. And, Mr. Dietz, what is your profession?

A. I am an attorney at law, member of the bar here in the District of Columbia.

Q. And we are engaged in trying——

The Court: No, no. Please do not make a statement. Just ask questions.

Mr. Cohen: Yes, Your Honor.

Q. (By Mr. Cohen) Did there come a time when you represented Mr. Mark Coppedge, the gentleman seated over here?

A. Yes, sir.

Q. And in the course of those investigations, did you have occasion to speak with one, Adam H. Artis, A-r-t-i-s?

A. Yes, I did.

Q. When were those conversations?

A. The date?

Q. Yes, if you can recall?

A. I could not possibly give you the exact date. I could give you in relation to other events, but I couldn't give you the dates by month or——

Mr. Cohen: If I might ask the Court, there has been to the jury's knowledge a prior proceeding——

[fol. 356] The Court: No, no. As I told you, please do not make any statements. You may ask questions.

Q. (By Mr. Cohen) Could you so pin down the time, Mr. Dietz?

A. Well, as you classified the "prior proceeding," it was——

The Court: Just a moment. What is your question?

Mr. Cohen: When those conversations took place, Your Honor.

The Court: He has answered that question. Ask the next question.

Mr. Cohen: I don't believe I have the answer, Your Honor.

The Court: You asked him when the conversations took place, and he said that he cannot fix the month or year. Now, ask the next question.

Q. (By Mr. Cohen) Where did those conversations take place?

A. In the cell block, behind either this Court or the Assignment Judge's Court, but I thought about this, and I'm pretty positive, in my mind, that it was behind this Court in the cell block.

Q. Yes. Could you tell us what those conversations were?

A. Yes, I could.

[fol. 357] Q. Would you——

Mr. Flannery: Your Honor, I object to a general question like that.

The Court: Objection sustained. That is obviously both incompetent and irrelevant.

Were you counsel for Artis?

The Witness: No, Your Honor, I was not.

The Court: That is all I wanted to know. The Court merely asked that to ascertain whether or not there was any attorney-client relationship.

The Witness: I understand that, Your Honor.

The Court: You may proceed.

Q. (By Mr. Cohen) Did you discuss with him the facts and circumstances concerned with a housebreaking and with a grand larceny, allegedly committed on December 2, 1957, within the District of Columbia, involving one Mark Coppedge, Jr., Allen W. Alexander, Clarence H. Tyler, Clarence Thompkins wherein it was alleged that the——

The Court: Please don't make your question so long. Abbreviate your question.

Q. (By Mr. Cohen) Was your conversation to do with that happening and happenings subsequent relating to it?

The Court: Just answer yes or no.

The Witness: As to the subsequent——

The Court: I beg your pardon?

[fols. 358-361] The Witness: It's a double-barrel question, Your Honor. It was subsequent things I talked with him about.

The Court: Subsequent events?

The Witness: Yes.

The Court: Events subsequent to the housebreaking?

The Witness: Yes, Your Honor.

Q. (By Mr. Cohen) Did you discuss with him events having to do with the writing out and the passing of money orders obtained through those events?

A. Yes, I did.

The Court: Just answer yes or no.

The Witness: Yes.

The Court: I want the preliminary questions answered first, you see.

. . . . . .

[fol. 362] Q. (By Mr. Cohen) Did you speak with Mr. Artis, and did he tell you the circumstances concerning the passing of the check at the Borak Gayety Liquor Store?

A. I did speak with him, and he did tell me circumstances of the passing of checks. My recollection, as of this minute, would not cover what the name of the liquor store was, but it was the store involved in the charges.

Q. And was that a charge where Mr. Artis had passed a [fol. 363] check successfully at that time?

A. It was a Nation-Wide Money Order, as I recall, and my recollection is that he did negotiate the money order and get the money from the proprietor.

Q. And did he discuss with you to whom he gave the money he obtained by cashing that money order?

A. Yes, he did.

Q. And to whom did he give those monies, did he tell you?

A. He told me that he gave the money to a co-defendant, Alexander.

Q. And not to Mr. Coppedge, Mark Coppedge?

A. I am positive of that point, because I questioned him thoroughly about it. Not to Coppedge. He told me he had nothing to do with Coppedge. As I recall,——

The Court: Just a moment. Just confine yourself to answering questions.

Mr. Dietz: I'm sorry, Your Honor.

The Court: That is all right.

Q. (By Mr. Cohen) Did he tell you in substance—strike that.

Did he tell you that officers or representatives of the District Attorney's Office had told him that he would either plead guilty to forgery in his case or else that he would be charged with housebreaking?

A. My recollection is that it was the F.B.I. who was [fol. 364] supposed to have made arrangements with him. That is the best that I can remember.

Mr. Cohen: I would have nothing further, if Your Honor please. Thank you.

The Court: Very well.

Cross-examination.

By Mr. Flannery:

Q. Relative to what the F.B.I. said to Artis, Mr. Dietz, what was that?

A. Mr. Flannery, I can, to the best of my recollection, relate the conversation that—Artis was in one part of the cell block—back here,——

(Indicating.)

—divided by a screen and a steel wall from Coppedge. Coppedge was very excited when I came back in there, and told me——

The Court: Not what Coppedge said.

The Witness: I wasn't going to say what he said, Your Honor. I understand. He told me certain things which immediately I inquired of Artis whether they were true or not, these matters that Coppedge had related to me, and Artis and I then had a conversation.

Q. (By Mr. Flannery) I'm interested in what Artis told you about the F.B.I.

A. That's what I'm getting to, Tom.

[fol. 365] Now, the very best that I can recall, he told me

that an F.B.I. Agent down south—not Mr. Woods—because I remember I asked him whether it was Joe Woods that he was referring to. It was not Woods. It was supposed to have been an F.B.I. agent south, either in Virginia, or North Carolina, or South Carolina, had made arrangements with him that he was to plead guilty to forgery, and that they would drop all the other charges against him, housebreaking, et cetera, if he would testify that Mark Coppedge was the one that gave him the money order. I questioned him about these things.

Q. Did he say that that was the F.B.I. agent who had questioned him in North Carolina?

A. That is my recollection—that it was not Woods—it was an F.B.I. agent in North Carolina, which I don't even know if such a person existed.

Q. Was that perhaps Agent Darragh—D-a-r-r-a-g-h?

A. Upon my oath, I would never remember it. I don't think he ever told me any particular name that I can recall now. All I can recall was that it was not Woods, that is my recollection.

Q. Did he tell you that the F.B.I. had arrested him in North Carolina?

A. No, I couldn't say—I couldn't say that he told me that. He could have, but I don't remember it.

Q. Did he tell you that the F.B.I. had suggested certain [fol. 366] things to him in North Carolina about his forthcoming testimony?

A. That would be a conclusion—well, my opinion from what he said.

Q. Well, did he say that the F.B.I. put words in his mouth, so to speak, down in North Carolina, and suggested to him that he implicate Coppedge?

A. If you mean did he make that statement?

Q. Yes?

A. I couldn't say honestly that he made that statement in that many words

Q. Did he say anything similar to that?

A. My conclusion from what he told me was along those lines.

Q. What was it? I know it's inadmissible, but what were your conclusions?

A. Well, my conclusion was that anybody could make Artis say anything they wanted.

Q. Was it your conclusion that the F.B.I. had more or less prompted him to say what he subsequently said involving Coppedge?

Mr. Cohen: Your Honor,——

The Witness: I——

The Court: You may answer.

The Witness: I couldn't honestly say that I believed Artis. I wouldn't believe Artis under any circumstances.

[fol. 367] Q. (By Mr. Flannery) I didn't ask you that. I asked you was it your impression from talking to Artis that the F.B.I. had prompted Artis to say what he did about Coppedge's alleged involvement in this case?

A. My personal opinion? No.

Q. Now, then, Mr. Dietz, isn't it a fact that at the prior proceeding, after, as you say, you talked to Artis back in that cell block, that he took that chair, that witness seat, and you confronted him with what allegedly had just occurred a few minutes before in the cell block? That is a fact, isn't it?

A. By all means.

Q. And under oath he denied that he had said that to you, didn't he?

A. My recollection is that he did deny that he said that. But he said it just the same.

Q. Do you recall, Mr. Dietz, in connection with the prior proceeding that there was a written statement from Artis?

A. I don't have any recollection of that at——

Q. You don't recall reading that and examining it?

A. I could have, but I don't remember it right now. There were so many witnesses in that case. I would say this: Knowing the way that I handled the case, if there was a statement, and I know this Court would have ordered that I [fols. 368-384] be shown that statement if the man testified from it, and if he testified from it, then I read it. I know this Court would order——

Q. You don't recall anything about the statement or questioning Artis about it?

A. I could not honestly say that I have recollection even of him signing the statement.

* * * * * * *

[fol. 385] Mr. Flannery: Furthermore, Your Honor, contained in this same report is a copy of Artis's written statement. The F.B.I. is still searching for that original. We haven't located it here. Here is a copy contained in this four pages of that.

The Court: Under the law, Mr. Cohen is entitled to see it.

* * * * * * * *

[fol. 386] (Counsel Having Returned to Trial Tables.)

(Following is Court Exhibit No. 1, which was copied into the record:)

Federal Bureau of Investigation
Reporting Office: Charlotte
Office of Origin: Washington Field
Date: 1-9-59
[fol. 387] Investigative Period: 11-21—12-4—58
Title of Case: Adam Huldah Artis
Was fugitive—et al.
Report made by Lindian J. Swaim
Typed by JHS

Character of Case: Interstate transportation of stolen property—conspiracy

Reference

Report of SA Joseph I. Woods, Washington Field, 10-28-58.

HUC—Administrative

The records reflected on 12-20-51, Artis was admitted to the Perry Point, Maryland, VA Hospital, and was transferred from there to VA Hospital, Washington, D. C., 1-18-52, where he remained until 3-4-52, when he was discharged as having received maximum hospital benefits. At Perry Point, Maryland, VA Hospital, his condition was diagnosed as follows:

(1) Hodgkin's disease.
(2) Lymphadenoma.
(3) Lymphatic leukemia.
(4) Infectious mononucleosio.
(5) Metastatic Carcinomas.
(6) Lymphosarcoma.

On 9-1-52, he was admitted to the VA Hospital, Washington, D. C., and discharged 9-29-52.
[fol. 388] His diagnosis on this occasion was Lymphosarcoma and pulmonary infarct.

1-10-57, he was again admitted to the VA Hospital, Perry Point, Maryland, and discharged from there 1-16-58. On this occasion his diagnosis was:

(1) Grand mal epilepsy.
(2) Periodontoclasia.
(3) Calcarus on teeth.
(4) Gingivitis.
(5) Apical infection.
(6) Insufficient dentation.
(7) Lymphosarcoma.

On 7-19-58, Artis was admitted to the VA Hospital at Durham, N. C., and remained there until discharged 8-17-58. His diagnosis on this occasion was:

(1) Cerebral Vascular accident. (Stroke)
(2) Chronic lymphosarcoleukemia in remiss.

On 9-8-58, he was readmitted to the VA Hospital, Durham, N. C., and again discharged 10-8-58. On this occasion his diagnosis was chronic lymphosarcoleukemia in remiss and paresis (one sided paralysis due to stroke).

Record reflects he returned to the hopsital for recheck but no re-admission on 10-23-58, 11-6-58 and 11-20-58. He was scheduled for return and retreatment at the hospital 1-8-59.
[fols. 389-403] A report on this investigation has been deferred due to the fact that the signed statement furnished by the subject on 12-2-58 was forwarded to Washington, D. C., for use in trial where it was entered in evidence.

The report was held in abeyance pending the return of instant signed statement by the U. S. Attorney, Washington, D. C.

The Court: You may proceed, Mr. Flannery.

[fol. 404] Robert L. Bush, Called as a witness in behalf of the defendant, being first duly sworn, was examined, and testified, as follows:

Direct examination.

By Mr. Cohen:

Q. Mr. Bush, when you speak, will you try and keep your voice up, so His Honor, the Court, and the jury can hear you. Will you tell us your full name, please?

A. Robert Linton Bush.

Q. Robert Linton Bush?

The Court: Speak loudly and slowly and distinctly, like [fol. 405] the Court is doing, and like Mr. Cohen is doing.

Q. (By Mr. Cohen) Mr. Bush, the first time we met was today, is that correct?

The Court: Oh, no, no, no. You may not do that. Proceed with eliciting the testimony that you expect to elicit.

Q. (By Mr. Cohen) Mr. Bush, were you at any time a cell mate of Adam H. Artis's and of Mark Coppedge's?

A. I was.

Q. Where and when was that?

A. At Lorton Reformatory.

Q. When was that?

A. February '58.

Q. Now, while you were, how many others were there, if any others, in that cell?

A. There were none others.

Q. None others. For how long a period of time were you three together in that cell block?

A. For ten days.

Q. And during that period of ten days, did you take part in and did you overhear conversations between Mr. Artis and Mr. Coppedge?

A. I overheard conversations.

The Court. What is your answer?

The Witness: I overheard conversations.

Q. (By Mr. Cohen) And with regard to those did they— [fol. 406] and answer this yes or no only—did they deal

with a housebreaking and a larceny, and then later events, stealing, the passing of money orders, gotten as a result of the housebreaking and the larceny which happened sometime around December 2, 1957?

A. Yes, I did.

Q. And could you tell us the conversations you heard, you took part in, as regards,——

Mr. Flannery: Your Honor,——

Mr. Cohen: If I may finish the question.

Q. (By Mr. Cohen, continued) Don't answer this question, because there will be an objection.

Can't you tell us conversations which you took part in o which you overheard between Mr. Artis and Mr. Coppedge here, regarding that incident, and whether Mr. Coppedge had anything to do with it?

The Court: No, no. Please don't characterize his testimony. You may say, "subject matter," but stop right there.

Mr. Cohen: I will stop right there.

Mr. Flannery: Your Honor, I would object to that.

The Court: Objection sustained.

I might give the reason for my ruling: Anything that the defendant said would be a self-serving declaration. What Artis said is not admissible, because he has not been con- [fol. 407] fronted with that statement—with anything that he said to this witness.

Mr. Cohen: May we approach the bench on this, Your Honor? It is a little delicate.

The Court: No, no. I have ruled. I am not going to hear argument on this.

You may proceed.

Mr. Cohen: May I ask the Court one question?

The Court: Yes, indeed.

Mr. Cohen: May I ask the witness regarding matters that would directly contradict the testimony of Mr.——

The Court: No, no. As far as anything the defendant said is concerned, I have ruled that it is inadmissible, because it is a self-serving declaration. Anything that Artis said is inadmissible because Artis was never confronted with that statement. When I say, "with that statement," I mean with anything that he said to this witness. That is perfectly elementary.

Mr. Cohen: Of course, the proceedings—I haven't had them here——

The Court: Counsel at the prior proceeding could have inquired about that.

Mr. Cohen: Then I would have nothing further of Mr. Bush.

The Court: Very well.

[fols. 408-410] Mr. Flannery: No questions.

The Court: You may step down.

(The witness stepped down.)

* * * * * * *

[fol. 411] Colloquy Between Court and Counsel

The Court: Are you going to have any requests for instructions?

Mr. Cohen: There is the question that your Honor had at the last trial also, whether or not we can characterize Quincy and Hattie as accomplices and get an accomplice instruction.

The Court: I gave that instruction, didn't I?

Mr. Cohen: If my recollection serves me, Your Honor did not. I think that on studying this, Your Honor might reconsider.

[fol. 412] The Court: I gave the accomplice instruction, but I have forgotten as to which witness.

Mr. Cohen: I am sure that it was as to Mr. Artis.

The Court: Oh, yes, as to Artis. How are the McCalls accomplices?

Mr. Cohen: Your Honor, it would be this: If you should believe the evidence put in that Quincy and Hattie McCall owned the trunk, and so on, then you should consider that they were accomplices in this transaction, and would have an interest in protecting themselves.

The Court: You are overlooking this: If it was their trunk, then Coppedge is not guilty.

Mr. Cohen: I believe so, Your Honor. Yes, that follows.

The Court: Therefore, they are not accomplices. If they did not own the trunk and were just storing it, they were not accomplices. On the other hand, if it was their trunk, then the case against Coppedge falls of its own weight; their is no case against Coppedge.

Mr. Cohen: We are hung—it's very funny, we are hung between those two things.

The Court: I know that that sometimes happens.

Mr. Cohen: If Your Honor please, also I would request that you read to the jury—I believe you adverted to it in your usual comments at the last trial, your impression of [fol. 413] the testimony of Mr. Artis. We have not had the advantage of the man's actual presence. If Your Honor please, I think that, in fairness, that should be provided.

The Court: I don't think that I should do that. Do you have any other requests?

Mr. Cohen: Of course, the instructions, much in the same form that you gave concerning these, are the instructions concerning Mr. Artis. I would request——

The Court: As to what?

Mr. Cohen: I believe that you did give it as to Thompkins, the accomplice instruction, since it was——

The Court: Yes. I want counsel to be definite as to just what they are requesting. If you want the accomplice instruction to be given with reference to Artis, I will do so.

Mr. Flannery: I would request on behalf of the Government, that it be given as to the co-defendants who have pleaded guilty and testified in behalf of Coppedge.

The Court: Yes. Yes.

Mr. Cohen: Can I withdraw my request?

The Court: Yes.

Mr. Cohen: If I do, I will ask Mr. Flannery to withdraw his.

Mr. Flannery: No, Your Honor. I would like the jury to know all the facts and all the law.

Mr. Cohen: I appreciate your zeal, Mr. Flannery, in this [fol. 414] regard.

The Court: I think that I will give the instruction——

Mr. Cohen: Will Your Honor reconsider that?

The Court: You may, of course, withdraw any request now, and Mr. Flannery makes an independent request that I give the accomplice instruction—as to which witnesses now?

Mr. Flannery: As to Tyler, Alexander——

Mr. Cohen: Oh, Your Honor, Tyler was acquitted in this trial.

Mr. Flannery: Well, Tyler was acquitted—that's true, but he was charged.

Mr. Cohen: It was the disposition.

The Court: Just a moment. He was acquitted, but he was acquitted, not because he was innocent, but because his guilt was not proven beyond a reasonable doubt. You see, the test as to whether an instruction on accomplices should be given must be based on the witness's own testimony. Mr. Tyler is not an accomplice under his own testimony. He testified that all he knew about the trunk was that Hudson asked him to help him carry it.

Mr. Flannery: I withdraw the request, and make it as to Alexander.

Mr. Cohen: I suggest that Mr. Alexander has pleaded, and has served his time.

The Court: He has not. He is on conditional release, and [fols. 415-419] he is subject to have his parole revoked.

Mr. Cohen: I request that I establish that from him on the stand, Your Honor.

The Court: Well, I thought that maybe Mr. Flannery would have wanted to establish that.

Mr. Cohen: I thought that maybe Mr. Flannery wouldn't.

The Court: But Mr. Flannery did not want to do it.

Mr. Flannery: No, Your Honor.

The Court: Alexander and Artis are the accomplices.

Mr. Cohen: May I ask whether the Court will characterize the fact anyway—Hattie McCall admitted on the stand to being a thief and forger.

The Court: No. You can argue that. You can argue that. I am not going to characterize a witness like that.

Is there anything else?

* * * * * * *

[fols. 420-434] Mr. Cohen: Very well, Your Honor.

I have one or two other matters. I would also make a motion for a continuance to permit me to obtain the most recent information on the mental state of Adam Artis, Your Honor.

The Court: What his mental status is today is immaterial.

Mr. Cohen: I still am not satisfied in my own mind. This may well be—I would make the motion.

The Court: To obtain what?

Mr. Cohen: Sufficient time so that I can obtain evidence as to the mental state at the time he testified.

The Court: What evidence do you expect to obtain?

Mr. Cohen: I don't know until I would make a search. I would like to obtain the doctor who made the examination.

The Court: I am going to deny that. We cannot continue a trial for the purpose of making an investigation, especially since the issue does not appear relevant. But, in any event, it comes too late.

* * * * * * *

[fol. 435] Richard J. Darragh, Jr., called as a rebuttal witness in behalf of the Government, being first duly sworn, was examined, and testified as follows:

Direct examination.

By Mr. Flannery:

Q. Will you please state your name?
A. Richard J. Darragh, Jr.
Q. Will you spell your last name, please?
A. D-a-r-r-a-g-h.

The Court: Will you spell it again, please?
The Witness: D-a-r-r-a-g-h.
The Court: And your first name, Mr. Darragh?
The Witness: Richard.
The Court: Richard.

Q. (By Mr. Flannery) Now, Mr. Darragh, are you employed as a special agent of the Federal Bureau of Investigation?
A. I am.
Q. Were you so employed in December of 1958?
A. I was.

[fol. 436] Q. To what field office were you assigned at that time?
A. At that time I was assigned to the Charlotte, North Carolina, Field Office.
Q. Charlotte, North Carolina?
A. That is correct.

Q. Where are you presently assigned?

A. Indianapolis, Indiana, Field Office.

Q. Very well. In connection with your duties in December of 1958, did there come a time when you saw one, Adam H. Artis?

A. Yes, sir; there did.

Q. Where was it that you saw him?

A. Wilson County jail, Wilson, North Carolina.

Q. When was that?

A. December 2nd, 1958.

Q. What date was that?

A. December 2nd, December 2, 1958.

Q. Very well. Now, then, just answer this yes or no for the moment:

On December 2nd, 1958, did you question Adam Artis in connection with this case?

A. I did; yes, sir.

Q. Now, at that time, Agent Darragh, did you, yourself, know anything about the facts in this case?

A. Not one thing.

[fol. 437] Q. Now, when you questioned Artis, did you promise him anything for making a statement to you?

A. No, sir; I did not.

Q. Did you advise Artis of his rights, either to make or not to make a statement?

A. Yes, sir; I did.

Q. And, just answer this yes or no: Did he, after being warned of his rights by you, give you a statement?

A. Yes.

Q. And as he gave the statement to you, what did you do?

Mr. Cohen: Your Honor, at this time I would object to this line of inquiry.

The Court: On what ground are you objecting?

Mr. Cohen: This so-called statement is not in evidence.

The Court: No, I know, but this is in rebuttal to some of the matters that you brought out. I think that this is admissible.

Objection overruled.

The Witness: Would you repeat that, please?

Q. (By Mr. Flannery) As he, Artis, gave you the statement, what did you do?

A. I took it down in longhand.

Q. All right. Now, did you, during the course of that narration by Artis suggest to him what he should put in the [fol. 438] statement?

A. No, sir; I did not.

Q. Now, after the statement was given, what did you do with it? With the statement?

A. I submitted it to the Charlotte Office.

Q. All right. Did the witness sign the statement?

A. Yes, he did; yes.

Q. Now, did you tell Artis at that time that he should plead guilty to forgery or he would be charged with housebreaking?

A. No, sir.

Q. Was Artis arrested as a result of a request or information received from the District of Columbia?

A. He was.

Q. And you knew nothing about those charges in the District of Columbia?

A. Nothing at all.

Q. Then, the first that you learned of Artis's alleged connection and knowledge of this case is when he told it to you?

Mr. Cohen: Objection, Your Honor, on the ground it is repetitious.

The Court: Objection sustained.

Mr. Flannery: That's all, Your Honor.

[fol. 439] Cross-examination.

By Mr. Cohen:

Q. Where is that statement?

A. I assume it is en route, since it has been called for.

Q. Yes. And that statement was in your writing, is that correct, that you refer to?

A. All except, I believe, the last sentence, which would be in Mr. Artis's handwriting, in addition to his signature.

(Brief pause.)

Q. And that statement was taken down in his words, as he spoke them, is that correct?

A. I would say basically it would be the way he said it, yes.

Mr. Cohen: Yes. May we approach the bench, if Your Honor please?

The Court: Yes.

(At the Bench:)

Mr. Cohen: Your Honor, at this time I think it very important that we be given any time table; Mr. Flannery was good enough——

The Court: That you be given what?

Mr. Cohen: A time table. If we ask now for the actual, original statement taken, as this officer has testified. Mr. [fol. 440] Flannery has been good enough to give——

The Court: There is nothing before the Court. What is the purpose of your coming to the bench?

Mr. Cohen: Well, may I introduce this? Mr. Flannery, would you have objection?

The Court: You mean in lieu of the original?

Mr. Cohen: No, Your Honor. I am not going to introduce this unless I can get the original. This is a copy.

The Court: I understand; but you want to introduce this in lieu of the original, is that the force and effect of your objection?

Mr. Cohen: I want to move for the use of it, unless I were given the original also for comparison purposes. I have my reasons.

The Court: You do not have to state any reasons. But for what purpose did you come to the bench? That is what I want to know.

Mr. Cohen: Well, I want to know whether or not if I begin to use in my examination of this witness—this purports to be——

The Court: What is your request? Let's move along, Mr. Cohen. There are too many bench conferences.

Mr. Cohen: My question is this: May I have permission to obtain the original of this statement? The witness——

The Court: You just called for it. You have a right to [fol. 441] call for it.

Mr. Cohen: It is supposedly on its way, notwithstanding that, I——

Mr. Flannery: The F.B.I. is still looking for it. Well, I have been told that it is en route here.

The Court: En route from where?

Mr. Flannery: North Carolina.

The Court: It probably won't get here today. You can use this if you want to. You see, you are calling for all of these documents at the tail end of the trial. After you have already rested.

Mr. Cohen: Your Honor, I called for this earlier. Mr. Flannery, I believe, agrees. It was at least the last day before this——

The Court: This trial has been going on for a week. There is nothing before the Court. Let's proceed.

Mr. Cohen: Very well. I will be given that.

(Counsel Having Returned to Trial Tables.)

The Court: You may proceed.

Mr. Cohen: Yes, Your Honor.

Q. (By Mr. Cohen) If You can recall, Officer, did he state:

(Reading) "I entered the designated liquor store and cashed it as instructed. I purchased two fifths of whisky, six cans of beer, and two packages of cigarettes. [fol. 442] I received the change from the one hundred dollars, and returned to Steve, Mark and Allen in the automobile."

A. If you are reading it as it appears on that statement, basically that is exactly what he said.

Q. What do you mean by the word, "basically?"

A. He said that.

Q. I did not misread this statement in any way.

A. That is what he said.

Q. I assure you.

A. Basically, that is what he said.

The Court: I suggest that counsel should confine himself to asking questions and not making statements.

Q. (By Mr. Cohen) Did he also state:

(Reading) "I have been acquainted with three Negro males, known only to me by the names, Mark, Steve and Allen, for approximately one year?"

A. If that is what the statement says, that is what he said.

Q. In his words?

A. That is what he said.

Q. Did he also state: And I read from this:

(Reading) "I now live with my mother, Etta Artis, at Route 2, Box 257, Stantonsburg, North Carolina. I attended five grades of grammar school in Eureka, Wayne County, North Carolina."

[fol. 443] A. That is correct.

Q. He said that, too?

A. That is correct.

Mr. Cohen: Your Honor, at this time, I would have nothing further for this witness, though I want to tell the Court that I might call him after receiving certain information.

The Court: You have rested.

Mr. Cohen: Then I might want to continue my examination of the witness after I am in receipt of a certain document that the Court knows of.

The Court: Well, we are not going to wait for that. You had better continue your examination of the witness now if you haven't finished with it. We are not going to wait for any document, as I indicated at the bench conference.

Mr. Cohen: That will be all then of this witness in this case.

Mr. Flannery: May I ask a few more questions, Your Honor?

First, may I have this marked for identification?

The Court: I think that it should be.

Mr. Cohen: May we aproach the bench, Your Honor?

The Court: Yes, indeed.

(At the Bench:)

The Court: Ordinarily, there should be no bench con-[fol. 444] ferences unless there is something before the Court, like an objection or something of that sort. We are having too many bench conferences. Briefly, what is it that you wish?

Mr. Cohen: I most likely misunderstood the Court. I thought that I would be given opportunity to examine that statement which is on its way for a couple of days. I made the point or tried to, that I would not go into this matter unless I would be given that opportunity.

The Court: No, no. I am not going to recess the case. Let's proceed. You have a copy of the statement.

Mr. Cohen: Your Honor, I don't believe that it should be admitted.

The Court: What is that?

Mr. Cohen: I will wait. I am premature on that.

The Court: Very well.

(Counsel Having Returned to Trial Tables.)

(Accordingly, Government's Exhibit No. 10, copy of the statement of Adam Artis, was marked for identification.)

Redirect examination.

By Mr. Flannery:

Q. Agent Darragh, I will now hand you what has been marked as Government's Exhibit No. 10 for identification, four typewritten pages.

I will ask you to look at this document, and tell the Court and the jury whether that is a copy, exact copy of the state-
[fol. 445] ment which Adam Artis gave to you as you have testified?

A. (Examining the document) Yes, it is.

Q. Very well. Now, then, with reference to the question that Mr. Cohen asked relative to Artis's statement, that he had been in a car and had gone in a liquor store with a money order, did he state further to whom he gave the money secured as a result of cashing the money order? Just answer that yes or no.

Mr. Cohen: Your Honor,——

The Witness: Yes, he did.

Mr. Cohen: —I would object to this line of questioning, if the Court Please.

The Court: Objection overruled. That will be laced with the same matter that you brought out. That is the reason I am admitting it.

Mr. Cohen: Yes, Your Honor.

Q. (By Mr. Flannery) To whom did he say he gave the money?

A. He referred to a gentleman by the name of Mark as having received the change.

Q. Mark. Had you ever heard that name before that day?
A. Not prior to my talking with Mr. Artis, no.

Mr. Flannery: That is all.

Recross-examination.

By Mr. Cohen:

Q. I believe, Officer, your exact words were that this, [fol. 446] Government's Exhibit No. 10, is an exact copy of the statement Artis gave you, is that correct?
A. I assume that to be the correct answer, yes, since my name appears on the end of it there.
Q. Was that not a written statement you first made, you told us?
A. It was. It was.
Q. Then, this is not an exact copy. It's a transcription perhaps?
A. To my knowledge, I would say that it is an exact copy.
Q. Not of the physical document? It may be an exact copy of——

The Court: That is a copy. It is not a carbon copy, but it is a copy. The word "copy" does not necessarily mean carbon copy, you know. I take it that what the witness means is that it is an exact, verbatim copy of the document.
Mr. Cohen: That is what I am trying to——
The Court: That is what he said. The word "copy" does not mean carbon copy necessarily. Apparently you are assuming that the word "copy" means carbon copy.
Mr. Cohen: It does to me, Your Honor.
The Court: No, it does not. That is not the dictionary meaning. There are all sorts of copies. Anything that is an exact reproduction of another document is a copy, [fol. 447] whether it is a carbon copy or whether it is copied in longhand or on a machine.
Mr. Cohen: Yes, Your Honor.

Q. (By Mr. Cohen) Do you know where the original handwritten statement is at the present time?
A. As I said previously, I believe it is en route between Charlotte, North Carolina, and Washington, D. C.
Q. Do you know when it was called for?
A. I assume it was called for in the same communication

which instructed me to report here, which we received in Indianapolis Friday afternoon, teletype.

Q. That would be the past Friday.

The Court: We won't go into the details. They are very immaterial.

Mr. Cohen: Thank you very much.

The Court: You may step down.

(The witness stepped down.)

GOVERNMENT RESTS

Mr. Flannery: The Government rests, Your Honor. That concludes our rebuttal.

The Court: The Government rests. Do both sides rest?

DEFENDANT RESTS

Mr. Cohen: Yes, Your Honor.

The Court: We fixed a time limitation for summing up before we recessed for lunch.

You may proceed, unless there is something else before [fol. 448] summing up.

Mr. Cohen: One matter, I believe, Your Honor.

The Court: If there is, you may come to the bench.

(AT THE BENCH:)

Mr. Cohen: Just out of an abundance of caution. I am sure, Your Honor, you did rule that you would not permit me time to get the original statement and to examine Officer Darragh, the last officer who testified, you did rule on that, Your Honor, did you? I just want to be sure that you ruled.

The Court: Of course, I ruled on it.

Mr. Cohen: You did.

(COUNSEL HAVING RETURNED TO TRIAL TABLES.)

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FINAL ARGUMENT ON BEHALF OF GOVERNMENT BY MR. FLANNERY

Mr. Flannery: May it please the Court and ladies and gentlemen of the jury, now having heard the evidence in this case, it becomes your responsibility to reach a verdict—a

fair verdict, fair to the defendant, of course, and fair to [fol. 449] the people of this community.

Now, the Government submits to you that the evidence here has developed a picture of a very clever person in the form of Mark Coppedge—a person clever enough to remain in the background while he sent dupes and weaklings in to do his dirty work, so to speak.

The evidence in this case—you heard the witnesses—I submit to you shows that such a pattern was followed by Mark Coppedge.

I would like to allude, very briefly, to that evidence, so that I may point out to you why I made that statement.

Let's look at the indictment. This defendant, as you know, has been indicted in ten counts. The first count charges housebreaking, and the second count charges grand larceny.

You might well ask yourselves at this point, "Well, what evidence is there that Mark Coppedge broke into the New Fidelity Drug Store on December 2nd, 1957, perpetrating the crime of housebreaking, and what evidence is there that he stole the substantial sum of money that was taken and the money orders which play a part in the other counts of this indictment?"

Now, admittedly, the evidence in regard to those two counts is circumstantial. There is no question about that. [fol. 450] There is no direct testimony in this case, there is no witness who is able to say that he saw Mark Coppedge or the other alleged accomplices in this case actually break into the drug store and actually steal this property, but there is circumstantial evidence that shortly after, a matter of a day or so after the crimes committed at the New Fidelity Drug Store, there is evidence that Coppedge was in possession of certain of the stolen property. And there is an inference that one found in possession—recent possession—of stolen property is the one who stole it.

Now, the Court will instruct you in regard to that aspect of the law, and I will ask you to listen very carefully to it, and to listen carefully also to the Court's instruction on circumstantial evidence—just what that is and how the jury should view it.

Now, there is testimony, as I say, that Coppedge was in possession of stolen property. Where is that testimony? That testimony was given to you through the lips of Quincy

McCall and Hattie McCall. You heard those two individuals testify that in December of 1957, there came a time when Jimmy Hudson and one, Steven Tyler, or Clarence Tyler, brought a trunk to their apartment. The evidence shows that those individuals said that Mark, or Coppedge, sent this trunk, and the trunk was left there.

Then, there is further testimony by both of these wit- [fol. 451] nesses that Coppedge, as I recall, came to their home on Meridian Place on two occasions thereafter, and went into that trunk, opened the trunk by means of a key which he, Coppedge, had.

Now, that shows that Coppedge had exclusive control or possession over the trunk and the contents, because you know from other testimony in the case, the testimony of Officer Lyons, that around the middle of December when he came to that apartment, he opened it and found certain of the stolen property in there, the stolen money orders; and we know that they were the stolen money orders because they had a number, an identifying number on them. So there is recent possession of stolen property, stolen money orders in the possession of Coppedge.

Then there is another aspect of this case which I think is most important, ladies and gentlemen, it bears your serious consideration: There is not a shred of testimony in this case from anyone that there was any reason why Quincy McCall or Hattie McCall or any other witness should lie about Coppedge's participation in this case. The testimony is to the contrary. As I recall, the only testimony relative to the type of relationship between Coppedge and the McCalls was this: They were friends. Now, that is important. Is there one shred of testimony that there was any animosity between Coppedge and the McCalls? Why, out of all the people in the District of Columbia who had some [fol. 452] connection, one way or the other, in this case, would the McCalls pick Coppedge, and say that he is the prime mover in this case; he is the one who had the trunk sent there; he is the one who came there with the key and opened the trunk? Why would they say that? There is only one obvious answer, so far as the Government is concerned, and I think that I am justified in saying that on the basis of the evidence—the only reason that they said it is because it is the truth.

If there had been any ill will between these people—and, certainly, if there had been ill will, you would have heard about it—then you might well say to yourself, "Well, these people are enemies. There is some feeling of animosity on the part of the McCalls against Coppedge, and they have a motive to color their testimony and to implicate him and, to use a slang expression, to 'frame him'." But there is no such testimony in this case at all. If you could say to yourself, "Well, now, the McCalls were in a bad spot; maybe they were the guilty ones, and they had to implicate someone else to get themselves out, or something of that sort." Well, if that is so, why would they pick Coppedge out of all the people in the District of Columbia who had a connection with this case? If they wanted to do that, if they wanted to exculpate themselves and to put the blame on someone, they wouldn't put it on their friend, would they?
[fol. 453] They could have said to the police, "Hudson and Tyler brought the trunk here, and they said it was their trunk, and would we hold it for them." That would be a way of attempting to exculpate or getting themselves out of it, and put it on someone else, but to put it on Coppedge—there isn't a reason in this case advanced by any of the testimony as to why they would fabricate this. I think that is important. You are people of intelligence and people of experience and common sense, and I think that you should seriously consider that in connection with this case.

Now, there is other important testimony in this case implicating Coppedge: The testimony which you heard read to you of Adam Artis. Now, Adam Artis testified, under oath, at a prior proceeding in regard to this matter, and implicated Coppedge. You recall the testimony that I read back to you. He said, Artis did, in his testimony that, I believe he described it on a snowy day in December of 1957, he was standing up on Fourteenth Street and Kalorama Road, this car drove up, and Coppedge was in the car, and Tyler, I believe he said, was in the car, and Allen Alexander; he was called over to the car, got in the car, and testified that Allen Alexander filled out the first money order, and they went to a liquor store. And it turns out from that testimony and other testimony that that was Mr. Borak's liquor store. The testimony of Artis reveals [fol. 454] that he took this money order, he went into the

liquor store, cashed it, and came back and gave the money to Coppedge.

Now, true enough, there was testimony in this case by Allen Alexander, called on behalf of the defendant, that that wasn't the way it happened at all. He said, "No, I was with Artis originally, and we hailed this car, driven by Tyler in which Coppedge was a partner, and we all went down to this liquor store; I gave Artis a money order which I had, and Artis went in, and he came back and gave me the money." Well, now, who is telling the truth in this case? You've got to decide that. Is Allen Alexander telling you the truth in that regard? Allen Alexander is a friend of Mark Coppedge's, admittedly. Allen Alexander who tells you, "Well, no, he never talked this over with anyone;" Allen Alexander who says, "This is the truth." Remember that he is an accomplice in this case, and listen carefully to the Court's instruction in regard to the weight that should be given to the testimony of an accomplice.

Isn't it reasonable to suppose, from the evidence and from the circumstances in this case, that Alexander is here trying to do a favor for his friend Coppedge at this stage of the game; he, Alexander, has pled guilty, and his part of the case is finished, a certainty; it is a good, nice thing for him to do now, as far as Coppedge is concerned, he feels, [fol. 455] to come forward and exculpate Coppedge, and say, "Oh, he had nothing to do with it." Isn't it strange that he didn't come forward sooner? These crimes happened in December of 1957. Isn't it strange that Mr. Alexander's story that Coppedge had nothing to do with it is now stated for the first time here in March of 1960? Why didn't he come forward before? Why didn't he tell the police if what he says is the truth now, why didn't he tell the truth then when this thing originally happened, and when there was a prior proceeding on that? That is all very strange, ladies and gentlemen.

Now, in connection with Artis's case, too, I think that this is very significant: The last witness who testified in this case, a Federal Bureau of Investigation agent, Darragh, told you that in December of 1957, he arrested Artis as a result of a request from the Federal Bureau of Investigation. Artis had been a fugitive in this case up until that point, and hadn't been apprehended.

Now, again, I say this is very significant: Agent Darragh didn't know anything about the facts in this case. He had merely received a request to have this man arrested, Artis arrested. Artis was arrested, and there came a time when Artis was in the jail in North Carolina, and Agent Darragh went over to talk to him. Now, there has been the suggestion, through the testimony in this case—certainly, I got the impression from Mr. Dietz's testimony—that when Artis [fol. 456] was questioned in North Carolina, that words were put in his mouth, promises were made to him, and that he was induced, more or less, to involve Mark Coppedge in this case. But you heard from the testimony of Agent Darragh that he didn't know anything about this case. He didn't even know who Mark or Mark Coppedge was. You heard that he talked to this witness, Adam Artis, and Adam Artis volunteered to tell him, after being advised of his rights, what he knew about the case, and the agent wrote it down as Artis told it to him. Now, why—here, again, is one of those strange little coincidents in this case—why is it that in that statement that Artis gave to the F.B.I. agent as he wrote it down, why is it that the name Mark came into the case—Mark Coppedge? Why is it that Adam Artis, the poor unfortunate Adam Artis, who was used as a dupe in this case by this very clever fellow, why is it that Adam Artis told the F.B.I. agent that he was in the car, "I went to the liquor store from the car, and I came out." "Who did you give the money to?" "Mark." Now, there is a statement being taken by a completely disinterested F.B.I. agent who knew nothing about the case, nothing at all, and he tells you that Artis made the statement to him—doesn't that show you, ladies and gentlemen, that Artis is telling the truth in this case, and Alexander is not? Do you think that the F.B.I. agent got on the witness stand and deliberately perjured himself in this case? I think not, ladies and [fol. 457] gentlemen. I point those things out to you for your serious consideration.

There is testimony—or the indictment, as I say, is drawn in ten counts—the first two deal with housebreaking and larceny; and the remaining seven counts deal with the passage, the forgery and uttering of three checks, the first check being what has been referred to as the Morris Gevinson check.

Now, you heard the testimony of Mr. Gevinson in that regard. That was given last week, and Mr. Gevinson testified that he was at his store on upper Fourteenth Street one day, and a person came into his store and presented this money order to him. Mr. Gevinson got suspicious, picked up the 'phone, and this person ran away. Now, who was that person? The person was Adam Artis. We know that. How do we know it? Because Mr. Gevinson was shown a picture of Adam Artis—we know that the picture was of Adam Artis, because Agent Woods identified it as a picture of Adam Artis,—Mr. Gevinson said, "Adam Artis gave that check to me." And then, "When I picked up the 'phone," Mr. Gevinson said, "this individual ran away." Another link in the chain of evidence.

We know through the testimony of Adam Artis that he went to a store on Fourteenth Street, that Mark Coppedge was in the car on that day, Allen Alexander was in the car, and Alexander had given him the check. Certainly, we can [fol. 458] infer from the subsequent testimony about the liquor store, where Coppedge also was in the car and got the money, that Coppedge was involved as an accomplice in this Gevinson incident, too. They were all together, and it all happened on this day when they were running around and trying to cash these checks, and sending poor old Artis in there to do the dirty work while they stayed out in the car.

The Borak check I have discussed. The other check in the case was a check passed over at Natoli's Liquor Store. Now, you recall in connection with that check that Quincy McCall testified that there came a time when he, Coppedge, came to his apartment on the second occasion, opened the trunk, got some green pieces of paper, and that he, McCall, and Coppedge and Tyler and Clarence Thompkins, who refused to testify, went over to Natoli's Market.

The evidence shows that on that occasion that Coppedge had the money orders. We know that from McCall, and that Thompkins was given one of these money orders, which Alexander filled out, and that Thompkins then went into the delicatessen and uttered the check. That testimony of McCall is corroborated by the testimony of Augustus Jackson, the clerk in the store, the person to whom the check was uttered. You remember that when Mr. Augustus Jackson was on the witness stand, I had Clarence Thompkins step

through that door, and Mr. Jackson said, "That is the man who gave me the money order." So, don't you see that the [fol. 459] testimony of Augustus Jackson furnishes a link in the chain of proof, and corroborates McCall's story to the effect that he was there on that day, and he was there with Coppedge, and that Thompkins went in with the money order.

Of course, Thompkins, as he had a perfect right to—he has a Constitutional right not to testify in this case—refused to testify.

Now, the defendant called certain witnesses in this case. He called Clarence Thompkins, too. Clarence Thompkins refused to testify, so he shed no light on this matter.

He called Clarence Tyler. Clarence Tyler told you that he had taken this trunk with Jimmy Lee Hudson to Quincy McCall's apartment. He told you that he really didn't know whose trunk it was, but he said, "I carried it up to Quincy McCall's." Now, he testified further that when he was arrested in this case, he told the F.B.I. that he had done this, that he had carried the trunk to Quincy McCall's apartment, but we know, ladies and gentlemen, from the testimony of Agent Woods and Agent Brick, that Tyler, when questioned, didn't know anything, didn't say anything. Certainly, it would appear, if you believe the F.B.I. agents in this case that Mr. Tyler lied to everybody.

Now, if a witness testifies falsely about any material fact in a case, and he couldn't be reasonably mistaken about that [fol. 460] fact, you have a right as jurors, as a matter of common sense, to disregard that testimony or the testimony in its entirety, if you so see fit.

Now, the same way with the testimony of Allen Alexander, another friend of Coppedge.

Isn't it strange that all these people who were called by Coppedge are former friends or former inmates in jail? It is all very strange.

But Allen Alexander testified further, too. He testified that it was all his fault as far as the money order was concerned. I have discussed that previously. That he sent Artis in there, and that he got the money. Well, as I say, I have discussed that aspect of this case, but he said further that he had talked to the F.B.I., and, I believe he was the one—maybe it was Tyler—anyway, one of these people said that

the F.B.I. had said, "Well, now, look, you plead guilty in this case, you testify, and we'll be standing in your corner." Well, we know from the testimony of the F.B.I. that that just didn't happen, ladies and gentlemen, didn't happen in this case.

Allen Alexander testified also that he told the F.B.I. that he had won two of these money orders in a crap game; said that he told that to the F.B.I. However, when the agent from the Federal Bureau of Investigation was questioned in that regard, he denied that Allen Alexander had told him that at [fol. 461] all. We know that neither Alexander nor Tyler made any statement.

Again, in connection with him isn't it strange that he should wait until March of 1960 to come forward with this story? Why wasn't it heard before?

Another witness called by the defendant was one, Hazel Lee Lewis, another inmate in the jail. He testified likewise, that he was a friend of Coppedge, and, as I recall his testimony, he said, "We got very friendly down at jail." He had known him before he went to jail, too. This witness, Hazel Lee Lewis, testified that he had seen this trunk in the apartment of the McCalls; that he had stayed with them, and that he had seen some green papers in this trunk. And he testified in regard to this machine—you recall that, ladies and gentlemen—I think, certainly, that witness was not being truthful with you. He was trying to act from the witness stand. He almost won an Oscar up there. You recall how he showed this machine—he went into great detail—"Put the machine down on the floor so I can look at it at an angle." Ladies and gentlemen, isn't it obvious what he was trying to do? He was trying to make it real good. Did you believe what he said? The friend of Coppedge, the person who had been close to him in jail. I submit to you that his demeanor and appearance on the witness stand showed the type of individual that he was. And, again, it seems awfully [fol. 462-473] strange that this individual didn't come forward sooner. Why didn't he tell the police what he knew about it? Why, before March of 1960, didn't he come in and tell you what he claims he knows about the case.

Ladies and gentlemen, it's been a long case. Frankly, I can't remember all the testimony and the ramifications of the testimony. I have tried to point out what I consider to

be significant parts of the evidence for the sole purpose of trying to aid you regarding the facts in the case in reaching a fair decision in the case.

The Government feels that the evidence in this case, as I said earlier, shows that this fellow Coppedge is a rather clever type of a criminal, clever enough to remain in the background and send in weaklings and dupes to do his dirty work. That is a fair statement, based on the testimony, and you have a duty, I submit, in this case to find this person guilty.

The Court: We will take our usual mid-afternoon recess at this time.

(Accordingly, at 2:55 p.m., the Court recessed for a brief period.)

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[fol. 474] REBUTTAL ARGUMENT ON BEHALF OF GOVERNMENT BY MR. FLANNERY

Mr. Flannery: May it please the Court. Ladies and gentlemen, I have just a few brief remarks to make in rebuttal to [fol. 475] Mr. Cohen's statement. He points out to you that the people he called were the friends of Coppedge, and those are the only witnesses who were available. Well, that may well be true. But I still say to you that I think it is significant, the uncontradicted testimony in this case is that the McCalls were friends of Coppedge, too.

And again I come back to this proposition of motive. Certainly, as Mr. Cohen would suggest, looking at the case from one viewpoint, it might have been a motive on the part of the McCalls, caught with possession of the trunk, to lie in some regard. But I still say this to you: What motive did they have to implicate Coppedge? Why Coppedge, their friend? And why is it that when another individual connected with this case is arrested, hundreds of miles away from here in North Carolina, that he again mentions that name, Mark—Mark Coppedge? Why is it? It is too much of a coincidence, ladies and gentlemen.

Now, as you have heard from the testimony of the F.B.I. agent who was stationed in North Carolina, he didn't know a thing about this case. He went over and talked to Artis, and Artis implicated this man, and it all adds up. Any piece

of that testimony standing alone, you might say to yourself, would be insufficient, but when you look at this case, the total picture of this, and the total atmosphere of this case, it all adds—all these things fill in and form a perfect chain, [fol. 476] and when the testimony is completed, you see the chain, the arrow pointing to Mark Coppedge. It is indisputable.

Now, counsel has said this: He dropped the pencil, and he said, "They can't prove their case to the certitude that you know that this pencil dropped on the table." Of course, not. In every human relationship, ladies and gentlemen, there is some element of doubt. There is very little certainty in anything except perhaps in mathematical form to the effect that a straight line is the shortest distance between two points, that is a mathematical certainty perhaps, but in relationships between people, there is always an element of doubt.

Now, if you have some doubt about some aspects of this case, that certainly wouldn't require you to acquit this defendant. The only time that a doubt comes into a case is when it is a reasonable doubt, and the Court will define "reasonable doubt." It is a doubt based on reason; a doubt based on common sense and an abiding conviction. Now, if you have that sort of a doubt about this case, then, of course, you should acquit Coppedge. You have that duty. But because you have a whimsical or speculative or capricious doubt wouldn't require you to acquit Coppedge. If you do do that, ladies and gentlemen, you would n't be doing your duty in this case.

Now, counsel has posed this question: Where is the trunk? [fol. 477] You heard the testimony to the effect that there had been a prior proceeding in this case. You heard Officer Lyons testify that certain property was returned, and certainly the Government has made every reasonable effort to gather all this property, including money orders and this machine, and the trunk—and it's quite a job, after some passage of time, believe me, to gather exhibits. We did our best. Unfortunately, we didn't find the trunk, but there is testimony about the trunk, and you have heard that. We have done our best to bring everything here for your benefit. Both the McCalls testified about the trunk, and you heard them say that it was not their trunk. You heard the woman,

Hattie McCall, testify that she picked this padlock on the trunk. I submit to you if you've got four or five hours, and you want to fool around with an ordinary padlock, if you've got enough patience, you can pick that lock—I think you people realize that.

In any event, I say to you, when you have this case in its complete and entire viewpoint, that logically you must come to the conclusion that Coppedge in this case is guilty.

Again I point out to you, and I pose this to you and ask you to think about it: Why is it that hundreds of miles away, all away from the District of Columbia, when Artis was questioned by a man who knew nothing about this case, why is it that he implicated Coppedge? There is only one answer [fols. 478-479] to that, ladies and gentlemen.

Thank you.

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[fol. 480] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Washington, D. C.

Transcript of Proceedings—March 8, 1960

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[fol. 481] (COUNSEL HAVING RETURNED TO TRIAL TABLES.)

CHARGE TO THE JURY

Holtzoff, J.: Ladies and gentlemen of the jury, this case has taken quite a number of days to try. However, the trial has not lasted as long as it seems, due to the fact that on several of the days I was constrained to hold rather short [fol. 482] sessions. This was due to the fact that several of my colleagues have unfortunately been ill, and it was incumbent upon me to devote part of those days to the work that ordinarily would have been done by my absent colleagues. So, too, the nature of the evidence in this case, together with the introduction of numerous details, necessarily takes longer than perhaps seems reasonable.

On its face the case may perhaps seem a bit complicated.

but actually it can be reduced to very simple terms, and I am going to endeavor to do that, and to point up the very narrow issues that you have to decide. After all, every matter, no matter how complicated it may seem at first, can be reduced to a simple question by adequate analysis.

Before taking up the case that you have to decide, I shall make a few preliminary remarks to you concerning your functions and my functions, respectively, owing to the fact that this is the first case in which you, as members of this month's panel, have been called upon to sit. As I go along with my instructions, I shall also make them perhaps a little more elaborate and a little more detailed than I otherwise might, due to the fact that this is your first case.

At the outset, I want to say that under the system of jury trials prevailing in the Federal Courts, it is the function of the Court, that is, it is my function and my duty, to instruct the jury as to the rules of law that must govern the disposi- [fol. 483] tion of the case on trial.

You, ladies and gentlemen, are bound and obligated to take the law from the Court and to follow the Court's instructions as to the law.

On the other hand, the jury decides the facts. You, ladies and gentlemen of the jury, are the sole judges of the facts, and you must decide the facts yourselves on the basis of the evidence, and solely on the basis of the evidence introduced at this trial.

In addition to instructing the jury as to the law, I have still a further function to perform in connection with my instructions to you, and that is to summarize the evidence and to comment on the facts and on the evidence to the extent to which it appears to me to be desirable to do so, in order to aid and assist the jury in arriving at its conclusions, and solely for the purpose of aiding and assisting the jury. My discussion and summary of the evidence and my comments on the facts and on the evidence are not binding on you, and you need attach to them such weight as you deem wise and proper, because they are intended only to help you. If your recollection or your understanding of the evidence in any particular differs from mine, then it is your recollection and your understanding that must prevail, because, I repeat, the final decision on the facts is solely within your

province. My instructions are binding on you only as concerns the law.

[fol. 484] Coming now to the case on trial, the defendant, Mark Coppedge, Jr., is on trial on charges of housebreaking, grand larceny, forgery, uttering, attempting to utter, and interstate transportation of forged securities.

Specifically, it is charged that on or about December 2nd, 1957, he, together with others, broke into a drug store known as the New Fidelity, located at 3704 Fourteenth Street, Northwest, in this City; that he, together with others, while in the drug store, after having broken into it, stole certain property, including a checkwriting machine, thirteen hundred dollars in cash, a number of cartons of cigarettes, a revolver, keys, and some blank Nation-Wide Money Orders.

It is also charged that he, together with others, forged these blank money orders, or several of them, by inserting names therein as well as amounts, and that he uttered, or attempted to utter, that is, passed, in ordinary phraseology, those forged money orders at several stores, and that he caused the forged money orders to be transmitted to Maryland for the purpose of having them presented to the bank on which they were drawn.

It now becomes your duty to determine whether the defendant is guilty or not guilty of the charges on which he is being tried.

The indictment, you will observe, names several defend-[fol. 485] ants. As has been shown in the course of the trial, the case of each of the other defendants named in the indictment has been disposed of, and only the case of the first defendant named in the indictment, Mark Coppedge, remains for decision. Consequently, you will ignore the charges against the other defendants named in the indictment and bring in a verdict merely as to the defendant, Mark Coppedge.

The indictment consists of sixteen counts. Only ten counts are now being presented. The eleventh, twelfth, thirteenth, fourteenth, fifteenth and sixteenth counts are not now before us. Consequently, you will concentrate your attention solely on the first ten counts, and accordingly, you will bring in ten verdicts, a verdict on each of the first ten counts in the indictment in respect to the defendant, Mark Coppedge, Jr.

In instructing you on the law in this case, I shall com-

mence by summarizing a few general principles that are applicable to all criminal cases, including, of course, this one.

First, the fact that a defendant has been indicted and is charged with a crime is not in itself an indication of guilt, because an indictment is merely the procedure and the machinery by which a defendant is brought before the Court and is placed on trial.

Second, every defendant in a criminal case is presumed [fol. 486] to be innocent. This presumption of innocence attaches to him throughout the trial.

Third, the burden of proof is on the Government to prove the defendant's guilt beyond a reasonable doubt. Unless the Government sustains this burden and proves beyond a reasonable doubt that the defendant has committed every element of the offense charged, the jury must find him not guilty.

I think that you have heard from counsel the words, "proof beyond a reasonable doubt," used a number of times in the course of this trial. As I said, the burden of proof is on the Government to prove the defendant's guilt beyond a reasonable doubt. But what is proof beyond a reasonable doubt? Proof beyond a reasonable doubt does not mean proof beyond all doubt whatsoever. It means proof to a moral certainty, and not necessarily proof to an absolute or mathematical certainty. By "a reasonable doubt," as its very name implies, is meant a doubt based on reason; and not just some whimsical speculation or some capricious conjecture. I can explain to you the meaning of the words, "proof beyond a reasonable doubt," in simple, every-day language: Proof beyond a reasonable doubt simply means this: If, after an impartial comparison and consideration of the evidence, you can say to yourself that you are not satisfied of the defendant's guilt, then you have a reasonable doubt. But, on the other hand, if after such impartial [fol. 487] comparison and consideration of all the evidence, you can truthfully and candidly say to yourself that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then, you have no reasonable doubt. In other words, proof beyond a

reasonable doubt is such proof as will result in an abiding conviction of the defendant's guilt on your part, such a conviction as you would be willing to act upon in the more weighty and important matters relating to your own affairs.

In determining whether the Government has established a charge against the defendant, you will consider and weigh the testimony of all the witnesses who have testified at this trial, as well as all the circumstances concerning which testimony has been introduced. Circumstances frequently cast an illuminating light on oral testimony.

You are the sole judges of the credibility of the witnesses. I mean by that that it is for you and for you alone to determine whether to believe any witness, the extent to which any witness should be credited, and the weight that should be attached to the testimony of any witness.

In reaching a conclusion as to the credibility of any witness, and in weighing the testimony of any witness, you have a right to consider any matter that may seem to you to have a bearing on the question. For example, you have a right [fol. 488] to consider the demeanor and the attitude of the witness on the witness stand, the witness's manner of testifying, whether the witness impresses you as a truth-telling individual, whether the witness impresses you as having an accurate memory and recollection, whether the witness has any motive for not telling the truth, whether the witness has any bias for or against the defendant, and whether the witness has any interest in the outcome of this case.

If you find that any witness willfully testified falsely as to any material fact concerning which the witness could not have possibly been mistaken, you are then at liberty, if you deem it wise to do so, to disregard the entire testimony of that witness or any part of that witness's testimony.

No doubt you have observed, in connection with the testimony of several of the witnesses, that it was brought out on their cross-examination that they have a criminal record. The law admits the criminal record of any witness; solely, however, for the purpose of assisting the jury in determining whether or not to believe the witness, and in deciding whether he is a trustworthy individual, and for that purpose only.

Among the witnesses, the Government called the witness, Artis. The defendant called the witness, Alexander. Both

of those witnesses are accomplices of the defendant on the basis of their own testimony.

[fol. 489] An accomplice is anyone who knowingly and voluntarily cooperates with, or aids, assists, advises or encourages another in the commission of a crime.

The testimony of an accomplice must be received with care and scrutinized with caution. I do not mean by that that the accomplice may not be believed. You have a right to believe the testimony of an accomplice; but before deciding whether or not to believe him, you must scrutinize his testimony with care and caution. In fact, the law permits the jury to convict a person on the sole and uncorroborated testimony of an accomplice if the jury decides to believe the accomplice.

In criminal cases, ladies and gentlemen of the jury, there are two types of evidence. One type is known as direct evidence. The other type of evidence is known as circumstantial evidence.

By direct evidence is meant evidence of a witness who saw the act perpetrated.

Circumstantial evidence, on the other hand, consists of circumstances from which the defendant's guilt may be inferred by the jury.

To give you a simple illustration; Suppose a defendant is on trial on a charge of breaking into somebody's home through a window. If a passerby saw him and can identify him as the person whom he saw, that would be direct evidence. It is evidence of an eyewitness. On the other hand, if [fol. 490] nobody saw him, but his fingerprints are out on the window sill or window sash, that would be circumstantial evidence.

One cannot say that either of the two types of evidence is more reliable or stronger than the other. An eyewitness may make a mistake in identifying the person whom he saw; his memory may be inaccurate, or he may intentionally fabricate a story. Circumstances, too, may sometimes lead to an erroneous inference. On the other hand, if the circumstantial evidence is sufficiently strong, it may be even more convincing than direct evidence, if the circumstances irresistibly lead to a definite conclusion.

The law permits conviction of a criminal offense on circumstantial evidence alone, if the jury is satisfied of the

defendant's guilt beyond a reasonable doubt. In fact, unless the law permitted convictions on the basis of circumstantial evidence alone, many crimes would go unpunished, because, naturally, a person who plans and commits a crime tries to do so where there are no witnesses at hand.

I am referring to this subject, because, in this case, much of the evidence is circumstantial; but that, if it convinces you of the defendant's guilt beyond a reasonable doubt, should not preclude you from finding a verdict of guilty.

There is another important rule of law that is applicable to this case and that you must bear in mind: If several [fol. 491] persons act jointly, each performing a part that results in the commission of an offense, then each of them is equally guilty of the offense, as though he performed and committed the entire offense himself. For example, if a person drives an automobile to the place where the offense is committed in order to enable the commission of the offense, and he knows the purpose for which he is driving the car, he is guilty of the offense to the same extent as the person who actually committed the offense.

Knowledge, of course, cannot be proven directly, because there is no way of delving into the recesses of the mind of another person. Knowledge may be inferred by the jury from circumstances, from things done, things said, and sometimes from the act itself.

Another rule of law connected with this is that any person who aids or abets, as the law says, another person committing the offense, is as guilty of the offense as though he had himself committed it.

This brings me to a specific consideration of the charges contained in this indictment. I will go through the ten counts, one by one, and discuss the applicable law, instruct you as to the applicable law, and discuss briefly the evidence pertinent thereto. But when I discuss the evidence, I want to say this: As I said before, my discussion of the evidence is not binding on you. I shall discuss it briefly in a skele- [fol. 492] tonized fashion. There may be other matters, other items of evidence, which I have omitted or that I shall omit that may appear important to you. On the other hand, it may be that some matters to which I shall advert may not appear significant to you.

You must decide the facts yourselves. You must weigh

the evidence yourselves on the basis of your recollection of it. What I say about the evidence is intended only to be of assistance to you, and is not binding on you.

The first count of the indictment charges housebreaking, as the crime is known under the District of Columbia Code, namely:

That on or about December 2nd, the defendant, in company with others, entered the store of Charles Lawrence and another with intent to steal property.

Housebreaking is defined in the District of Columbia Code, as follows:

> "Whoever shall break and enter, or enter without breaking, any dwelling, bank, store, or other building with intent to commit any criminal offense, shall be punished by the penalty that the law prescribes."

Now, of course, intent cannot be proven directly. It may be inferred by the jury from the surrounding circumstances, and even from the act itself.

The second count charges grand larceny, namely, that [fol. 493] after breaking into the store, the defendant, in company with others, stole certain property valued at over fifteen hundred dollars, consisting of over thirteen hundred dollars in cash, a check-writing machine, a number of cartons of cigarettes, fifty Money Order blanks, a revolver and four keys.

Grand larceny is defined in the District of Columbia Code, as follows:

> "Whoever shall feloniously take and carry away anything of value of the amount or value of one hundred dollars or upward shall be punished by the penalty prescribed by law."

The words in the statute that I have just read, "feloniously take and carry away," mean that the property must have been taken unlawfully from the possession of another, with the fraudulent intent to convert the same to the use of the person taking the property.

To summarize briefly the evidence in support of these two counts:

You will recall that Charles Lawrence, one of the two owners of the New Fidelity Drug Store, testified that in the

early hours of December 2nd, 1957, between two-thirty and three a.m., he went to his drug store and found that it had been broken into. The rear door was broken into, as well as the cash register and the safe, and he testified that over thirteen hundred dollars in cash was taken; that between [fol. 494] fifty and one hundred blank money orders were taken and the check-writing machine.

You have a right to find, on the basis of the evidence, that housebreaking and grand larceny have been committed.

In order to show and establish that the defendant, Coppedge, was one of the perpetrators of the housebreaking and robbery, the Government called Quincy McCall and Hattie McCall as witnesses. Each of them testified that one, Tyler, and one, Hudson, early in December 1957, brought a footlocker to their apartment, and said that Mark Coppedge, the defendant in this case, sent it; that the next day, the defendant, Mark Coppedge, came, said that he had sent the trunk, and that he wanted to look into it and take something out; and that on that occasion, he unlocked the trunk with a key that he had in his possession, took something out of it that looked like some blank papers and put them in his coat pocket. They further testified that several days later, the defendant, Mark Coppedge, did the same thing again; that he came to the apartment, opened the trunk with a key, took something out of it, and put it in his pocket. Hattie McCall was very curious, apparently, as to what was in this trunk, and so she testified that she opened the trunk with a great deal of effort, spending about four or five hours, using a hair curler. Something has been said as to whether it was possible for her to do it, but, after all, it does not make too much difference so far as this case is concerned, because [fol. 495] her testimony as to the contents of the trunk does not stand alone. She testified that when she opened the trunk, after picking the lock, she found the check-writing machine in it, blank money orders and cigarettes.

Officer Lyons of the Metropolitan Police Department testified that on December 13, after making an investigation, he went to the McCalls' apartment and was admitted. He saw the footlocker there and opened it, and found that it contained cigarettes, money orders, a check-writing machine and keys. He opened the locker by the use of some tools.

Quincy McCall testified that he was present at that time, and gave the same account, or a similar account, as to the contents of the locker.

Now, you have a right to infer from this testimony that the defendant, Coppedge, had claimed the trunk as his and had the right to possess and control its contents.

Bear in mind what I said about circumstantial evidence. It is a rule of law that unexplained, exclusive possession of stolen property shortly after it was stolen is evidence from which the jury has a right to infer, if it sees fit to do so, that the person in control or in possession of the stolen property is the thief, or was the thief, and has a right to find him guilty of larceny or housebreaking, or both, as the case may be.

On the other hand, Tyler, who helped carry the trunk to [fol. 496] the McCalls' apartment, was called as a witness by the defendant, or in behalf of the defendant. He admitted that he and Hudson carried the trunk to the McCalls' apartment, but he testified that he helped do so at Hudson's request, and he denies that the McCalls were told that the trunk belonged to the defendant.

Hudson cannot be found.

It is for you to decide what the facts are.

The third and fourth counts relate to a transaction involving a check that was offered for cashing to one, Gevinson, who operated a grocery store in this city.

The charge is that the defendant participated in forging this check, and in attempting to utter the check. Bear in mind that the word, "utter," is a legal term for passing. This transaction is covered in the third and fourth counts.

Forgery is defined in the Code of Laws of the District of Columbia, as follows:

> "Whoever, with intent to defraud or injure another, falsely makes or alters any writing of a public or private nature, which might operate to the prejudice of another, or passes, utters or publishes, or attempts to pass, utter, or publish as true and genuine, any paper so falsely made or altered, knowing the same to be false or forged, with the intent to defraud or prejudice the [fol. 497] right of another, shall be punished by the penalty prescribed by statute."

The third count charges forgery of the check. To constitute forgery, three elements must exist. There must be a false writing on some written instrument; filling in blanks with amounts and names of a payee or payees may constitute forgery. Second, the instrument must apparently be capable of effecting a fraud. Three, there must be fraudulent intent.

Again, I say that the intent to defraud cannot be proven directly. Fraudulent intent is ordinarily proven indirectly. It may be gathered from what a defendant does or what he says, or from the surrounding circumstances, or even from the act itself.

The fourth count charges attempt to utter this check. The law defines that as:

> "* * * attempts to pass, utter, or publish as true and genuine, any paper so falsely made or altered, knowing the same to be false or forged, with the intent to defraud or prejudice the right of another."

An attempt to commit a crime consists of an intention to commit it; an act or step toward the commission of a crime, but falling short of the completed crime.

Gevinson testified that Artis and another person came into his grocery store, and presented a money order to be cashed. This money order has been marked in evidence as [fol. 498] Government's Exhibit 2. Gevinson says that he started to telephone the police, and then Artis and his companion ran out, leaving the check behind in Gevinson's possession. The check, therefore, was never cashed. It was merely, on the basis of that testimony, an attempt to cash it.

Artis was called as a witness, and he testified that he, Alexander, Tyler and Coppedge were together in a car. Coppedge was driving, and stopped the car at this grocery store; that the check was filled in while they were all in the car, and that Alexander and Artis went into the grocery store to cash it, and then ran out before the transaction was completed.

Counts five, six and seven relate to another check, namely, what has been called here the "Borak" check.

The charge in the fifth count is:

> That the defendant, in company with others, forged a money order.

And, in the sixth count, it is charged that that money order was uttered, that is, was cashed, by one, Abraham Borak.

In the seventh count, it is charged that that money order was caused to be transported in interstate commerce from the District of Columbia to the State of Maryland.

Now, taking the fifth and sixth counts, forgery and uttering:

[fol. 499] Borak testified that he operated the liquor store, and that Artis came in and cashed the check which has been introduced in evidence as Government's Exhibit 3. When I said, "check," I should have said, "money order," to be exact.

Artis testified that on that occasion, too, he, the defendant, Coppedge, Alexander and Tyler were in the car with him, Artis, and that Coppedge was driving; that the money order in question was filled in while they were all in the car; that the car stopped at Borak's Liquor Store, and that Artis was sent in to cash the money order, which he did.

Tyler testified substantially to the same effect, or, anyway, that he was present in the car. Let me put it this way: That Coppedge was driving, And Alexander and Artis were in the car, and Artis went into cash the money order.

As I said a moment ago, the fifth count charges the forgery of this check.

The sixth count charges that it was passed, namely, uttered, to use a legal term.

The seventh count charges interstate transportation. And here I want to give you a bit of an explanation. The pertinent statute provides that:

> "Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce —"

interstate commerce means from one state to another or from the District of Columbia to another state—

> [fol. 500] "any falsely made, forged, altered or counterfeited securities, knowing the same to have been falsely made, forged, altered or counterfeited, shall be punished by the penalty prescribed by statute."

The elements of the offense that the Government must establish in this instance are, as follows:

First, that a forged security was involved. The money order, as I have said before, is a security within the meaning of this statute, and, therefore, a forged money order is a forged security.

Second, that the defendant caused the forged security to be transported in interstate commerce, that is, from one state to another or from the District of Columbia to a state. If the defendant presents or participates in presenting a forged check or money order, purporting to be drawn on a bank in another state, and causes it to be cashed where he presents it, and the check or money order thereafter is transported to that other state, it is a matter of routine for presentation to the bank on which it purports to be drawn, and the defendant may be said to cause the check to be transported to that other state.

Third, it must appear that the defendant did what he did with unlawful or fraudulent intent. I have already said to you that intent cannot be proven directly, but may be inferred from circumstances.

[fol. 501] Robert Cohan was called as a witness for the Government, and he testified that he was an officer of the Nation-Wide Money Order Company, which issues these money orders, or distributes them to certain stores, which, in turn, sell them. He also testified that the money orders involved in this case were payable at the bank in Maryland, and that they reached that bank, and were presented to that bank for payment. His testimony did not relate to the Gevinson transaction, but to the Borak and Jackson transactions, to which I shall refer in a moment.

You have a right to infer from that testimony that those two money orders were transported to Maryland, and were caused to be transported from the District of Columbia to Maryland by the person or persons who offered them for cashing.

Counts eight, nine and ten involve the so-called Jackson transaction.

Jackson testified that two men came into his delicatessen store, and one of them, to-wit, Thompkins, presented for cashing a money order that has been introduced in evidence

as Government's Exhibit 5, and that he cashed it, that money order.

Other testimony was introduced by the Government to the effect that McCall and the defendant, Coppedge, Alexander and Thompkins were together in the car, that the defendant passed the money order to Alexander, who filled [fol. 502] it in, and then passed it to Thompkins, and that Thompkins and McCall went into the store and cashed it.

There is some dispute in the evidence as to whether, when the two checks here were cashed, whether the proceeds were handed to the defendant, Coppedge, or were handed to the defendant, Alexander. Whether it is one or the other is not too important. If you find that Coppedge was in the car and participated in forging the money orders and in causing them to be presented for cashing, of course, the mere fact that Coppedge was there, standing alone, is not sufficient to convict him; but the fact, if it be the fact, that he was driving the car with the intention of, if it was the intention of, bringing the party to a store to which the check was to be presented for cashing, if he knew that was the purpose of the trip, he can be said to be an aider and abettor and a participant in the offense, if you find that to be the fact.

Now, I want to say again, that so far as the evidence is concerned, my purpose was to summarize it for you very briefly and in skeletonized fashion merely in order to help you. What I have said about the evidence is not binding on you. It is your recollection of the evidence that governs. It is for you to decide whether to believe the evidence, and, of course, if you do not believe it, then you cannot find the defendant guilty.

I want you to take this matter and consider it in the light [fols. 503-507] of the instructions that I have given you, and in doing so, ladies and gentlemen of the jury, you must use the same practical approach, you must employ the same ordinary common sense and the same ordinary intelligence that you would employ in determining any other important matter that you have occasion to decide in the course of your every-day life.

As I said to you before, you will render a separate verdict in respect to the defendant, Coppedge, and Coppedge alone, as to each one of the first ten counts of the indictment. Ignore the last six. And in each instance, your verdict may

be either guilty or not guilty. As, of course, you must be aware, your verdict must be reached by unanimous vote.

Are there any objections to the Court's instructions?

Mr. Flannery: No, Your Honor.

Mr. Cohen: No, Your Honor.

• • • • • • •

[fol. 508] VERDICT

The Deputy Clerk: Members of the jury, your foreman says that you find the defendant, Mark Coppedge, Jr., [fols. 509-514] not guilty on the first count, not guilty on the second count, guilty on the third count, guilty on the fourth count, guilty on the fifth count, guilty on the sixth count, guilty on the seventh count, guilty on the eighth count, guilty on the ninth count, and guilty on the tenth count of the indictment; and that is your verdict, so say you each and all.

The Jurors: We do. (In union)

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[fol. 515] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

Washington, D. C.

Transcript of Proceedings—Friday, March 11, 1960

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[fol. 516] PROCEEDINGS

The Deputy Clerk: The United States versus Mark Coppedge.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: The Court will hear counsel.

Mr. Cohen: Good morning, Your Honor. Your Honor, this case has been tried twice. I think that Your Honor has a very full probation report. In that regard, there is one thing that I would like to check and be sure appears, if I

may, and that is the witness, Thompkins, at this trial, I would say, did properly in pleading the Fifth Amendment to questions put by both sides. With regard to that witness, Thompkins, hope that the probation report reflects the fact that the sentence which he now serves is for an assault committed upon his own brother, for which Mr. Coppedge also stands convicted. There was a misunderstanding, I believe, earlier, on the background circumstance with regard to that witness.

The Court: What is your point about this?

Mr. Cohen: My point on that, Your Honor, would be at the time there were certain newspaper articles at the prior trial which reflected—I know one of them did—that Mr. Coppedge had beaten viciously the brother of Thompkins. That well may be, but, by the same token, Mr. Thompkins was a co-defendant, and they were both convicted of the selfsame assault. I would not want Your Honor to possibly misunderstand. There was a question of whether or not [fol. 517] the witness Thompkins had been intimidated prior——

The Court: I do not think that has any bearing on what sentence should be imposed in this case; or do you contend that it does?

Mr. Cohen: At one time, Your Honor, there was a misunderstanding with regard to the circumstances. I just wanted to be sure the record was straight. I am sure that it would not enter Your Honor's sentencing, but to keep the the record clear, I thought I would advert to it.

Otherwise, Your Honor, I think that you are well aware of the background on the case. I would say this: We certainly cannot go behind the jury's conviction on the counts involved. I would stress the fact that there was an acquittal on what is possibly the more serious aspect of the transaction with regard to Coppedge, the housebreaking and grand larceny. I would urge to the Court that account be taken of the time that Mr. Coppedge—even this I don't misrepresent to the Court—he is in prison due to prior conviction——

The Court: He has not spent any time in jail awaiting this trial, nor has he served any time on the sentence im-

posed at the first trial. His incarceration has been pursuant to a prior sentence in another case.

Mr. Cohen: The Court is correct.

The Court: The Court cannot take that incarceration into account in this case.

[fol. 518] Mr. Cohen: Yes, Your Honor. I think that would be all I would have.

The Court: Mark Coppedge, is there anything you would like to say before sentence is imposed?

The Defendant: No, Your Honor.

SENTENCE

The Court: At the first trial, this defendant was convicted on ten counts. The first count was housebreaking, the second count was grand larceny, and the other counts were forgery, uttering and interstate commerce of forged securities. There was no question as to his guilt. The conviction was reversed by the Court of Appeals merely because there were some prejudicial articles that appeared in the press during the trial, and this Court refused to grant a mistrial, because, under our law, the Court cannot stop the press from printing prejudicial articles. The law is different in England, where the Court can fine or punish or cite for contempt if prejudicial articles are printed that may affect the trial.

It may well be that those articles did affect the jury. They may have done so unconsciously. So the Court of Appeals granted a new trial. That was the only point discussed in the opinion of the Court of Appeals, as I recall it.

Now, the second jury found the defendant not guilty on the first count, which is housebreaking; and on the second count, which was grand larceny; but found the defendant guilty on the other eight counts. I can see where the jury, [fol. 519] under the proof of this case could differentiate between the two groups of counts, and, in fact, I thought it showed considerable discernment, although I do think that the evidence was sufficient, although circumstantial, to justify conviction on all counts.

In view of the fact, however, that the jury acquitted the defendant on the first two counts, I think it would be only

fair for the Court to impose a shorter sentence than it did previously.

After the first trial, the Court imposed a sentence of two to six years on each count to run concurrently, but the sentences to commence at the expiration of the sentence in the case in which he is now serving a term of imprisonment. The Court is going to impose concurrent sentences again for a shorter term than two to six years, because of the reasons I stated, but also to commence after the expiration of the sentence he is now serving in the other case. He is not entitled, as I indicated, to any other credit, because he has not spent a single day in confinement to be credited to this case. All of his confinement was pursuant to sentence in the prior case.

Mark Coppedge, it is the judgment of this Court that on each count, three, four, five, six, seven, eight, nine and ten, you be imprisoned in an institution to be designated by the Attorney General of the United States for a term of not less than twenty (20) months, and not more than five (5) [fol. 520] years, the sentences to run concurrently and to commence at the expiration of the sentence that you are now serving in Criminal Case 105-58.

Mr. Cohen: Thank you, Your Honor.

(Whereupon, the hearing was concluded.)

[fol. 520a] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 521] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1960

No. 539 Misc.

MARK COPPEDGE, JR., Petitioner,

vs.

UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI —June 19, 1961

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

On Consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1044.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 19, 1961.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 157

MARK COPPEDGE, JR.,

Petitioner,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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Washington 6, D. C.

Attorney for Petitioner
(by appointment of the
Court of Appeals)

October, 1961

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 157

MARK COPPEDGE, JR.,

Petitioner,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The District Court's only opinion (R. 28-30), rendered on a pre-trial motion attacking the indictment, is not reported. The Court of Appeals rendered no opinion.

Jurisdiction

The Court of Appeals denied leave to appeal *in forma pauperis* on November 4, 1960 (R. 64). The petition for certiorari was filed November 16, 1960. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1), §1651 and §2106, and Rule 37(b) of the Federal Rules of Criminal Procedure.

Constitutional, Statutory and Rules Provisions Involved

The pertinent text of the following constitutional, statutory and rules provisions is set forth in Appendix A to this brief:

The Constitution's Preamble and its Due Process Clause.
18 U.S.C. §2314 (transportation of a forged security).
18 U.S.C. §3500 (the Jencks Act).
28 U.S.C. §1915 (proceedings *in forma pauperis*).
28 U.S.C. §2106 (appellate determination).
District of Columbia Code, §22-1401 (forgery).
Federal Rules of Criminal Procedure, Rule 52(b) (plain error).

Questions Presented

1. Whether petitioner's direct appeal from a criminal conviction presents one or more "not plainly frivolous" issues entitling petitioner, despite his indigence, to have his appeal reviewed and determined on the merits—particularly in the light of the standards set forth by this Court in *Ellis* v. *United States*, 356 U.S. 674, and related cases. Specifically, whether one or more of the following issues raised by petitioner's appeal is "not plainly frivolous":

(1) The group of questions as to the validity of the indictment:

(A) Whether an indictment is open to attack on the ground that the grand jury based its action on important testimony shown before the trial to have been false and perjured.

(B) Whether an indictment based on substantial false and perjured testimony is automatically salvaged if "other competent evidence" implicating petitioner were also before the grand jury.

(C) Whether the grand jury transcript should have been made available to defense counsel as demanded.

(D) Whether the District Court erred in concluding there was other competent evidence before the grand jury sufficient to indict petitioner; and whether it is not the duty of an appellate court to examine the grand jury transcript to determine this when the grand jury transcript has been withheld from defense counsel.

(E) Whether in any event the District Court, before determining that the indictment should be upheld, should have made a factual inquiry into whether Government agents were responsible for inducing false and perjured testimony, implicating petitioner, for presentation to the grand jury.

(2) Whether Judge Holtzoff should have disqualified himself and permitted the case to be tried before another judge.

(3) The group of questions as to prejudice resulting from the prosecution's use of extensive testimony previously given at petitioner's first trial by the co-defendant Artis, who was unavailable at this second trial:

(A) Whether Judge Holtzoff erroneously excluded impeaching evidence showing that

Artis (i) had subsequent to the first trial entirely retracted his first-trial testimony implicating petitioner in the offenses, and (ii) had also made prior admissions contradictory to his testimony.

(B) Whether Judge Holtzoff erroneously failed and refused to inform the jury of the significant deficiencies and weaknesses he himself had noted in Artis' testimony at the first trial.

(C) Whether Judge Holtzoff's failure to require the Government to produce the original of a statement in its possession, written out by the witness FBI agent Darragh and signed by the witness Artis, was error and in violation of the Jencks Act, 18 U.S.C. §3500.

(D) Whether prejudicial hearsay was erroneously admitted during FBI agent Darragh's rebuttal testimony on the Artis matter.

(E) Whether under the unusual circumstances of this case the first-trial testimony of Artis should have been entirely excluded.

(4) Whether the prosecutor's summation prejudiced a fair trial by unfairly vouching for the veracity of Government witnesses.

(5) Whether corroboration should be required to support a conviction based on the testimony of an accomplice.

(6) Whether Judge Holtzoff's charge was plainly defective in omitting to define an essential element of the offenses.

2. Whether the Court of Appeals' refusal to allow petitioner to prosecute his appeal *in forma pauperis* and its refusal to determine petitioner's appeal on the merits constitutes an unconstitutional (under the Due Process Clause) or an unlawful or an otherwise improper denial of justice or discrimination against indigent persons—particularly when petitioner's appeal presented issues of a type which the Court of Appeals clearly would review and determine on the merits in a comparable case involving a non-indigent appellant.

3. Whether it is in the interests of justice, in view of the history and circumstances of this case, for this Court now to determine on the merits at least some—and if necessary, all—of the issues raised by petitioner's appeal, instead of remanding to the Court of Appeals for an initial determination there on the merits.

Statement

This case presents another chapter in the long and incredibly arduous struggle to obtain fair and equal treatment for indigent defendants in criminal cases in the federal courts.

1. *Petitioner's first trial.*

Petitioner, Mark Coppedge, Jr., was indicted in the District of Columbia on June 16, 1958 on sixteen counts. The first two counts alleged housebreaking and grand larceny offenses for breaking into a pharmacy and taking some property, including a check-writer and a batch of blank money orders. The remaining counts alleged offenses of forging, attempting to utter and uttering (D.C. Code, §22-1401), and transporting in interstate commerce (18 U.S.C.

§2314), some of the money orders. Four other persons—namely, Clarence Thompkins, Adam H. Artis, Allen W. Alexander, and Clarence H. Tyler—were charged in the same indictment. Thompkins, Artis and Alexander pleaded guilty (R. 6).

Petitioner and Tyler were tried in December 1958 *before* Judge Holtzoff and a jury. Tyler was acquitted (R. 6). Petitioner was convicted on the first ten counts,[1] and acquittal was directed on the last six counts. One of the witnesses called by the Government at the first trial was the co-defendant Artis, who gave extensive testimony which was later used by the Government at the second trial when Artis became unavailable. During the first trial the Government called as a witness the co-defendant Clarence Thompkins, who repeatedly refused to testify despite several peremptory directions from Judge Holtzoff to do so. Thompkins' court-appointed attorney, and also the prosecutor, told Judge Holtzoff that Thompkins had seen an assault by Coppedge upon Thompkins' brother and that they thought the reason for Thompkins' refusal to testify was his fear of Coppedge. Accounts of this episode, including portions occurring outside the presence of the jury, were published in the Washington newspapers, one of which stated that police records showed Coppedge to be serving a prison term for assault with a deadly weapon on Thompkins' brother.

On appeal the Court of Appeals reversed petitioner's conviction because of the prejudicial newspaper articles published during the trial and because of Judge Holtzoff's failure to take proper measures to determine the effects of such prejudice on the jury. *Coppedge* v. *United States*,

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[1] Counts 3 through 10 of the indictment are set forth in Appendix B to this brief.

106 App. D.C. 275, 272 F.2d 504 (1959). Thereafter on October 14, 1959, new counsel was appointed by the District Court to defend petitioner at a second trial.

2. *The challenge to the indictment.*

Before the second trial took place a motion was made on November 16, 1959, challenging the validity of the indictment.[2]

This motion to dismiss and supporting documents (R. 8-10) attacked the indictment as having been obtained on the basis of Clarence Thompkins' false and perjured testimony given before the grand jury and induced by Government agents. (Thompkins was the co-defendant who, as already noted, page 6, *supra*, had refused to testify when called as a witness at the first trial.) Attached to the motion, as Exhibit 1, was a signed statement by Clarence Thompkins (entitled "Affidavit with Acknowledgment"), dated November 18, 1958, stating that on May 27, 1958, Thompkins had discussed this case with FBI Agent Joseph Woods; that Thompkins gave a false statement pertaining to the facts of said indictment against Coppedge [petitioner here] after being promised by Agent Woods that housebreaking charges against Clarence Thompkins would be dismissed if Thompkins would help to secure an indictment against Coppedge and one Tyler;

[2] In the present case the Court of Appeals denied leave to appeal *in forma pauperis* without even having ordered the record up from the District Court. Accordingly, the motion challenging the indictment is not itself included in the records of the Court of Appeals nor in the record certified to this Court by the Court of Appeals. However, the substance given here of the motion challenging the indictment does appear at R. 8-10, as part of the memorandum filed in the Court of Appeals by petitioner's present counsel; and the substance was obtained by inspecting the District Court record (designated Criminal Case No. 579-58).

that on or about June 3 and 4, 1958, Thompkins was brought to the U.S. District Court for a discussion with the U.S. District Attorney and was escorted to the grand jury room, where Thompkins gave false statements, implicating Coppedge in this offense, upon being promised by the U.S. Attorney that all other offenses would be dismissed against Thompkins upon entering a plea of guilty;[3] that this statement is not made under duress but of Thompkins' own free will and volition.

Exhibit 2 attached to this motion was a letter by Clarence Thompkins.[4] Thompkins' letter stated, among other things, that he was writing without threat or duress, of his own free will, to clear his conscience as he felt he and others had caused a great miscarriage of justice; that on May 27, 1958, Thompkins had been interviewed by FBI Agent Joseph Woods and truthfully admitted he and one Quincy McCall had committed the crime; that on June 4, 1958, Thompkins was brought to the U.S. District Court for a discussion with Mr. Flannery of the District Attorney's office and Mr. Wood, being promised by Mr. Wood and Mr. Flannery that housebreaking charges against Thompkins would be dismissed if Thompkins would help to secure indictment against other defendants; that Thompkins was escorted to the grand jury room where he gave

[3] Thompkins pleaded guilty on July 22, 1958 (R. 9).

[4] The copy of the letter attached to this motion had been addressed and sent to Mr. Dietz, the attorney who represented petitioner at the first trial. The original of the letter apparently had been addressed and sent to Judge Holtzoff while petitioner was awaiting sentence after being convicted at the first trial. At petitioner's sentencing on January 23, 1959, after conviction at the first trial, the transcript (January 23, 1959, pages 1-2) shows that Mr. Dietz then informed Judge Holtzoff that Mr. Dietz had received this letter; and that Judge Holtzoff said Judge Holtzoff had received the original of the letter from Thompkins (R. 9).

false statements implicating others; that after the indictment was returned on June 16, 1958, Thompkins had told his court-appointed counsel that he had made false statements to the grand jury, and his counsel had advised that Thompkins did not have to testify any more in the case; that a great miscarriage of justice had been done and the wrong person had been found guilty [the context shows this clearly refers to the fact that Coppedge, the petitioner here, had been found guilty at his first trial].

Also attached to the motion, as Exhibits 3 and 4, were two unsigned statements, which apparently had been written out for proposed signature by Clarence Thompkins, containing the substance of the foregoing, together with a statement that Thompkins "made certain false and misleading statements concerning Mark Coppedge, Jr., . . . such statements being prompted by Mr. Woods."

The Government did not file any answer or other written opposition to this motion (R. 72). The motion was argued before Judge McGuire on December 11, 1959 (R. 65-72). Petitioner's trial counsel informed Judge McGuire that he had made available to the court, to give testimony if necessary, not only petitioner but also Thompkins (R. 66). Judge McGuire acknowledged that as he understood the gist of the motion, "it is to the effect that a witness who appeared before the Grand Jury was promised if he went before the Grand Jury and testified falsely against the defendant in this case, he, himself, would not be prosecuted" (R. 69). Despite this, Judge McGuire said "I don't see any Constitutional question at all involved" (R. 70), and he did not take any testimony from Thompkins. The Government indicated it might furnish the grand jury testimony to Judge McGuire for examination (R. 72). Judge McGuire took the matter under advisement (R. 72).

By memorandum opinion dated December 22, 1959 (R. 28-30), Judge McGuire denied the motion. The opinion states that Judge McGuire meanwhile had made an examination of the grand jury proceedings of June 4, 1958, "with an eye toward the exclusion of the alleged perjurious testimony of the co-defendant [Thompkins]", and had been "satisfied that there was sufficient competent evidence to support the indictment herein challenged".

Judge McGuire's opinion proceeds on the basis that the allegations of Thompkins' perjury, supported by Thompkins' direct admissions of such perjury, must for purposes of the motion be assumed to be true. (Indeed, this was necessary since the District Court did not conduct any hearing to determine whether Thompkins' express admission of perjury was or was not true.) In holding the indictment nevertheless beyond challenge and not open to attack or further inquiry, Judge McGuire relied largely on his interpretation of this Court's ruling in *Costello* v. *United States*, 350 U.S. 359.

It appears that Judge McGuire had received the grand jury transcript—or at least parts of it—from the Government, which however refused to make such transcript available to defense counsel (R. 12). When the opinion showed that Judge McGuire had made a determination based on his *in camera* inspection, a motion was promptly filed on December 24, 1959, supported by a memorandum of points and authorities, to require that the grand jury transcript be made available to defense counsel (R. 12-13).[5]

[5] The motion itself is not part of the record in the Court of Appeals, since the Court of Appeals denied leave to appeal *in forma pauperis* without ever having ordered the record up from the District Court (compare note 2, *supra*). However, the motion as summarized here is described at R. 12-13, in the memorandum filed in the Court of Appeals by petitioner's present counsel.

In addition, a motion for reconsideration of the motion to dismiss the indictment was filed on December 29, 1959, was opposed by the Government, and was denied by Judge McGuire on January 4, 1960 (R. 73-74). The motion to obtain access to the grand jury transcript was argued on January 22, 1960, before Judge Holtzoff, who had presided at petitioner's first trial; Judge Holtzoff denied the motion, likewise relying on this Court's decision in *Costello* (R. 73-75).

3. *Grounds for disqualification of Judge Holtzoff.*

In the course of the January 22, 1960 argument on the motion, Judge Holtzoff made certain comments concerning petitioner which became the basis of motions, made at the outset of the second trial, that Judge Holtzoff should disqualify himself and have the case set for trial before another judge. Judge Holtzoff's comments appear in the following colloquy (R. 74-75) [emphasis added]:

> "Mr. Cohen [counsel for Coppedge]: Very briefly, the motion was based on perjurious implicating testimony, the evidence of the perjurious implicating testimony being letters written to the Court, of which I have purported copies and signed statements to this effect: The perjurer was a person named Clarence Thompkins. Your Honor may remember him from having the trial in your Court—he was the gentleman who refused, I believe, to even take the stand in the matter.
>
> "The Court [Judge Holtzoff]: I remember the episode very well. *He was just terrorized by Coppedge.*
>
> "Mr. Cohen: If Your Honor please, I am not alleging this; I am stating that this Thompkins, on signed statements, he asserts that he perjured himself.

"The Court: He asserts—*I imagine that statement was induced by Coppedge.* In any event, you cannot try cases twice or in bits. If the testimony was perjured, the jury will so find. We cannot first determine whether the Government's testimony is perjured and then try the case."

The second trial began before Judge Holtzoff on March 1, 1960 (R. 76). At its beginning, just after the jury had been empaneled, petitioner's court-appointed trial counsel made an unsuccessful effort to have Judge Holtzoff withdraw from the case, as follows (R. 77-78):

"Mr. Cohen: . . . May I ask Your Honor, and I ask most respectfully and at the request of my client, Mr. Coppedge, whether or not your Honor might consider withdrawing from the case?

"The Court: From what?

"Mr. Cohen: Withdrawing from the case.

"The Court: No, because the case was sent to me to try in the ordinary course of events. I don't think I have a choice in the matter. These things are not voluntary. It is unethical for a Judge to decline to try a case because it is unpleasant and impose an extra burden on some other Judge. No Judge should ever disqualify himself unless he is legally disqualified."

Shortly afterwards, on completion of opening statements of counsel but before taking of testimony had begun, petitioner's trial counsel made a second unsuccessful effort to persuade Judge Holtzoff to disqualify himself (R. 78):

"Mr. Cohen: If Your Honor please, we took the liberty of suggesting to the Marshal to hold the jury off while I address myself to the point we discussed

briefly at the bench. I wanted to do this in the presence of the defendant. As Your Honor knows, I was assigned—

"The Court: I don't care whether you are assigned or retained, because your authority is the same, and your duty is the same in either event.

"Mr. Cohen: I appreciate that my duty would be equal—

"The Court: Your duty would be equal, and the limitations are the same.

"Mr. Cohen: Yes, Your Honor. At a time most recent, I don't remember the date—it might show on the jacket—a motion came up before Your Honor in the case attacking the indictment. What I am addressing myself to is the problem as to whether or not, at the request of the defendant, the Court might not sit upon this matter.

"The Court: You have already brought that up at the bench conference, and I have disposed of the matter. You may not bring it up again.

"You may proceed.

"Mr. Cohen: For the record, if I may give the reasons—

"The Court: No, you may not. I don't know what you mean when you say, 'for the record.' Cases are tried before the Court and a jury; they are not tried 'for the record'.

"You may resume your seat, sir."

4. *The trial.*

Petitioner's second trial before Judge Holtzoff and a jury, on the first ten counts of the indictment (see Appendix B to this brief), took place on March 1, 2, 3, 4, 7 and 8, 1960 (R. 76-180). The evidence by which the prosecution sought to connect petitioner with the housebreaking and

larceny offenses charged in the first two counts of the indictment was admittedly (R. 156) entirely circumstantial, not direct; on these counts the jury acquitted petitioner. The evidence by which the prosecution sought to implicate petitioner in the transactions involving the three money orders on which counts three through ten are based[6] was in dispute and in many respects was in conflict with defense evidence; and the jury convicted petitioner on these counts.

During the trial a number of occurrences took place which give rise to additional substantial questions requiring appellate determination on the merits:

(1) *Issues as to use of the co-defendant Artis' first-trial testimony.* A number of these questions relate to the Government's use at the second trial (R. 90-129) of the first-trial testimony of the co-defendant Adam H. Artis. At the first trial Artis (who had pleaded guilty) had testified extensively for the Government, implicating petitioner in various of the offenses charged. At the second trial Artis was unavailable as a witness, being in North Carolina seriously ill with leukemia and with schizophrenia, paranoid type (R. 20, 77, 90-91, 100). Despite timely objections by defense counsel (R. 91, 93, 94-95, 97), Judge Holtzoff allowed Artis' first-trial testimony to be introduced. This

[6] Counts 3 and 4 relate to a money order which the co-defendant Artis attempted to cash with one Gevinson in a grocery store; counts 5, 6 and 7 relate to a money order which Artis cashed with one Borak in a liquor store; counts 8, 9 and 10 relate to a money order which the co-defendant Thompkins cashed with one Jackson in a delicatessen. All three money orders, before being filled in, had been among the blank money orders stolen during the housebreaking and larceny (Tr. 43-46, 53) which were the subject of counts 1 and 2, on which petitioner was acquitted. None of the three store proprietors gave testimony which implicated petitioner; for this the Government's case relied primarily on the testimony of its witnesses Artis and Quincy McCall.

included Artis' testimony on direct examination that on a Saturday afternoon in early December 1957, he met Coppedge, Tyler and Alexander in Tyler's car, which Coppedge was driving; that Alexander, in the presence of Coppedge and Tyler, said he had a check and "we can cash it if you do what I tell you to do", and that Alexander told Artis to go in the liquor store and say the money order came from his uncle in Roanoke; that they went in the liquor store; that Alexander made a purchase, signed the back of the money order (which is the basis of counts five, six and seven of the indictment); that the proprietor also gave Artis some change, and said Artis should come back the next day to get the remaining $20; that when Artis returned to the car, Coppedge and Tyler and Alexander were in the car and Artis gave Coppedge the money (R. 100-106). It also included Artis' testimony on direct that Alexander had then got a $50 money order and filled in Artis' name on it; that Artis and Alexander went into a grocery store while Tyler and Coppedge remained in the car; that Artis purchased some groceries and presented the money order (which is the basis of counts three and four of the indictment) to the owner, who said some checks had been stolen and picked up the receiver, whereupon Artis and Alexander ran out of the store, Artis leaving behind his identification card (R. 106-108).

Admissibility of the entire Artis first-trial testimony, under the unusual circumstances existing in this case, is one issue requiring appellate determination on the merits.

In addition, Judge Holtzoff excluded evidence showing that Artis, subsequent to the first trial, had entirely retracted his testimony implicating petitioner. The exclusion occurred when the defense sought to introduce into evidence an undated statement (reproduced at R. 22-23), which was not in existence and hence not available to coun-

sel at the time of the first trial (R. 91-92). This statement appeared to have been made subsequent to the first trial and to have been signed in two places by Artis. It wholly contradicted Artis' first-trial testimony implicating petitioner; and it recited that the statement "is made for the benefit of clearing my conscience and for justice, for I have just suffered a stroke." Judge Holtzoff initially said he would admit this recantation statement apparently signed by Artis if it were genuine, because he regarded its admission as "a matter of justice" even though he thought its admission "in violation of the rules of evidence" (R. 92, 93, 95), and he suggested the statement be turned over to the FBI for appropriate comparison of Artis' handwriting (R. 92, 94)—a suggestion to which defense counsel immediately agreed (R. 92). Then, however, Judge Holtzoff changed his mind and ruled that the recantation statement should be entirely excluded. Judge Holtzoff stated this was because only the signature was in Artis' handwriting and the statement was not dated or sworn to, and because the Judge recognized the body of the statement as being in "the handwriting of some gentleman who is an inmate of the penitentiary, because I have received papers from other prisoners in this handwriting" (R. 95-97). Thus Judge Holtzoff allowed the jury to hear Artis' extensive first-trial testimony implicating petitioner, but at the same time deprived the jury of all knowledge of the existence of what appeared to be Artis' subsequent total recantation. In other words, Judge Holtzoff excluded important probative evidence, offered to establish Artis' subsequent admissions that his prior testimony had been false and incorrect.

Furthermore, the defense called as a witness at this second trial one Bush (R. 142), who testified that he had been a cell mate of Artis and petitioner at Lorton Reformatory for ten days in February 1958, and that he had

overheard conversations between Artis and petitioner dealing with the charges involved in this case (R. 142-143). Upon the prosecution's objection (R. 143), Judge Holtzoff refused to permit Bush to testify to anything Artis had said or any admissions Artis had made directly contradicting Artis' first-trial testimony, "because he [Artis] has not been confronted with that statement—with anything that he said to this witness" (R. 143). Thus in this respect also, Artis' unavailability was unfairly used to block defense evidence of Artis' own statements proffered to contradict the Artis first-trial testimony which was read to the jury at this second trial.

Another issue arises out of Judge Holtzoff's failure and refusal to inform the jury of the deficiencies and the weaknesses Judge Holtzoff himself had noted in Artis' testimony at the first trial. At the first trial Judge Holtzoff had stated that "if requested, I shall instruct the jury that Artis . . . is not too reliable a witness" (R. 25), and in fact Judge Holtzoff then instructed the jury that "Artis was somewhat confused on the witness stand and you have a right to consider that in determining the weight to attach to his testimony" (R. 25). Judge Holtzoff also had instructed the jury that Artis "was a little uncertain as to whether he gave the money to Coppedge or Alexander because he seemed to waver back and forth" (R. 25). In addition, at the first trial Judge Holtzoff had stated (R. 25): "I want to ask the government a question which might perhaps shorten matters a little bit. To what extent are you going to rely on the Artis testimony? I would not send anybody to the penitentiary on the testimony of Artis. You would not either if you were a Judge."

At the second trial, however, when Artis was unavailable and Artis' first-trial testimony was read to the jury, Judge Holtzoff failed and refused to inform or instruct the jury concerning the deficiencies and weaknesses he him-

self had noted in Artis' testimony at the first trial. Judge Holtzoff's refusal, moreover, followed defense counsel's explicit request that this be done (R. 145).

Another issue arising in connection with the Artis testimony is whether Judge Holtzoff's failure to require the Government to produce the original of a statement in its possession, written out by FBI agent Darragh and signed by Artis, was error and in violation of the Jencks Act (18 U.S.C. §3500). Despite Jencks Act requirements, the prosecution failed to furnish to defense counsel the original of the statement Artis made to the FBI in Wilson County jail, North Carolina, on December 2, 1958, just after Artis had been arrested. Defense counsel duly and promptly requested this when the reading of Artis' first-trial testimony was completed at this second trial (R. 132); and several additional requests for the original were likewise made by the defense (R. 133, 149-151, 152-153, 155). The Government at first said "we expect it here shortly" (R. 133) and then that it was "en route" to Washington from the FBI's Charlotte office (R. 149, 154-155). Yet the Government never produced the original, although there was produced what the witness Darragh at first said "I assume" to be, and then claimed "to my knowledge" to be, a typed copy of the statement (R. 154). Judge Holtzoff did not require that the Government produce the original and he refused to hold the trial open until the original arrived, even though defense counsel made it clear that one reason for demanding the original was to use it as a basis for further cross-examination of Darragh (R. 151, 152, 153, 155).

Another issue in connection with the Artis matter is whether error was committed in receiving FBI agent Darragh's rebuttal testimony. Through Darragh the prosecution was permitted to introduce damaging hearsay to the effect that Artis immediately after arrest had made statements implicating petitioner as the person to whom Artis

gave the money Artis received from cashing one of the money orders. In particular, on redirect the prosecutor elicited from Darragh the following damaging hearsay testimony, over defense counsel's objections (R. 153-154):

> "Q. (By Mr. Flannery) To whom did he [Artis] say he gave the money?
>
> "A. He referred to a gentleman by the name of Mark [Coppedge] as having received the change.
>
> "Q. Mark. Had you ever heard that name before that day?
>
> "A. Not prior to my talking with Mr. Artis, no."

Moreover, the prosecutor in summing up strongly emphasized to the jury this item of inadmissible hearsay (R. 160, 166).

(2) *Issues as to the prejudicial unfairness of the prosecutor's summation.* The prosecutor's summation gives rise to important issues, requiring appellate determination on the merits, as to whether the prosecutor unfairly vouched for the veracity of Government witnesses. As a practical matter the trial's outcome turned largely on questions of credibility—whether the jury would believe, and beyond a reasonable doubt, the prosecution's witnesses even though in many respects their testimony was shaken or was contradicted by defense witnesses. Despite this circumstance the prosecutor in summing up vouched for the Government's witnesses. Thus with respect to two of his important witnesses, Quincy McCall and Hattie McCall, the prosecutor said (R. 157) [emphasis added]:

> "Then there is another aspect of this case which I think is most important, ladies and gentlemen, it bears your serious consideration: There is not a shred of testimony in this case from anyone that there was any

reason why Quincy McCall or Hattie McCall or any other witness should lie about Coppedge's participation in this case. The testimony is to the contrary. As I recall, the only testimony relative to the type of relationship between Coppedge and the McCalls was this: They were friends. Now, that is important. Is there one shred of testimony that there was any animosity between Coppedge and the McCalls? Why, out of all the people in the District of Columbia who had some connection, one way or the other, in this case, would the McCalls pick Coppedge, and say that he is the prime mover in this case; he is the one who had the trunk sent there; he is the one who came there with the key and opened the trunk? Why would they say that? *There is only one obvious answer, so far as the Government is concerned, and I think that I am justified in saying that on the basis of the evidence—the only reason that they said it is because it is the truth.*"

And again, with respect to the Artis testimony, as sought to be buttressed by FBI agent Darragh's testimony, the prosecutor said (R. 160) [emphasis added]:

"Now, again, I say this is very significant: Agent Darragh didn't know anything about the facts in this case. He had merely received a request to have this man arrested, Artis arrested. Artis was arrested, and there came a time when Artis was in the jail in North Carolina, and Agent Darragh went over to talk to him. Now, there has been the suggestion, through the testimony in this case—certainly, I got the impression from Mr. Dietz's testimony—that when Artis was questioned in North Carolina, that words were put in his mouth, promises were made to him, and that he was induced, more or less, to involve Mark Coppedge

in this case. But you heard from the testimony of Agent Darragh that he didn't know anything about this case. He didn't even know who Mark or Mark Coppedge was. You heard that he talked to this witness, Adam Artis, and Adam Artis volunteered to tell him, after being advised of his rights, what he knew about the case, and the agent wrote it down as Artis told it to him. Now, why—here, again, is one of those strange little coincidents in this case—why is it that in that statement that Artis gave to the F.B.I. agent as he wrote it down, why is it that the name Mark came into the case—Mark Coppedge? Why is it that Adam Artis, the poor unfortunate Adam Artis, who was used as a dupe in this case by this very clever fellow, why is it that Adam Artis told the F.B.I. agent that he was in the car, 'I went to the liquor store from the car, and I came out.' 'Who did you give the money to?' 'Mark.' *Now, there is a statement being taken by a completely disinterested F.B.I. agent who knew nothing about the case, nothing at all, and he tells you that Artis made the statement to him—doesn't that show you, ladies and gentlemen, that Artis is telling the truth in this case, and Alexander is not? Do you think that the F.B.I. agent got on the witness stand and deliberately perjured himself in this case? I think not, ladies and gentlemen. I point those things out to you for your serious consideration.*"

And again, the prosecutor said (R. 162-163) [emphasis added]:

"But Allen Alexander testified further, too. He testified that it was all his fault as far as the money order was concerned. I have discussed that previously. That he sent Artis in there, and that he got the money. Well, as I say, I have discussed that aspect of this case, but

> he said further that he had talked to the F.B.I., and, I believe he was the one—maybe it was Tyler—anyway, one of these people said that the F.B.I. had said, 'Well, now, look, you plead guilty in this case, you testify, and we'll be standing in your corner.' *Well, we know from the testimony of the F.B.I. that that just didn't happen, ladies and gentlemen, didn't happen in this case.*
>
> "Allen Alexander testified also that he told the F.B.I. that he had won two of these money orders in a crap game; said that he told that to the F.B.I. *However, when the agent from the Federal Bureau of Investigation was questioned in that regard, he denied that Allen Alexander had told him that at all. We know that neither Alexander nor Tyler made any statement.*"

And again, the prosecutor said (R. 163):

> "Another witness called by the defendant was one, Hazel Lee Lewis, another inmate in the jail. . . . I think, certainly, that witness was not being truthful with you. He was trying to act from the witness stand. He almost won an Oscar up there."

(3) *Issues as to Judge Holtzoff's charge.* In addition to Judge Holtzoff's refusal to inform the jury of the deficiencies and weaknesses which he himself had noted in Artis' testimony at the first trial (pages 17-18, *supra*), two other issues raised by the charge require appellate determination on the merits. As to both of these, no objection was made at the trial and accordingly a matter for appellate determination is whether the "plain error" doctrine applies.

First, Judge Holtzoff charged that the jury might convict solely on the basis of uncorroborated testimony of an accomplice (R. 171):

> "The testimony of an accomplice must be received with care and scrutinized with caution. I do not mean by that that the accomplice may not be believed. You have a right to believe the testimony of an accomplice; but before deciding whether or not to believe him, you must scrutinize his testimony with care and caution. In fact, the law permits the jury to convict a person on the sole and uncorroborated testimony of an accomplice if the jury decides to believe the accomplice."

Thus under the instructions it was not necessary for the jury to find any credible corroborative evidence if the jury chose to rely solely on the uncorroborated testimony of an accomplice. Judge Holtzoff also instructed that Artis was an accomplice (R. 170-171); this made it possible for the jury to convict, if they so wished, on the basis of their believing nothing but the uncorroborated testimony of Artis alone.

Second, in dealing with counts 7 and 10—the alleged offenses under 18 U.S.C. §2314, involving interstate transportation of a forged security—the charge clearly fails and omits to instruct the jury that, as an essential element of the offense, the Government must also establish knowledge on the part of the defendant that the security was falsely made and forged (R. 177-179).[7] Moreover, somewhat comparable inadequacies and lack of clarity appear in the portions of the charge (R. 175-177, 178-179) dealing with the elements of the offenses of forgery, attempting to

[7] On January 12, 1961, after the petition for certiorari was filed in this case, the District of Columbia Court of Appeals held in *Barry* v. *United States*, 109 App. D.C. 301, 287 F.2d 340, that such an omission, in a substantially identical charge given by Judge Holtzoff in the *Barry* case, was a fatal omission which constituted plain error requiring reversal even though the point had not been raised either at the trial or by the briefs or argument on appeal.

utter and uttering, which are the basis of counts 3, 4, 5, 6, 8 and 9.

After the jury's verdict acquitting on the housebreaking and larceny counts but finding petitioner guilty on counts 3 through 10, Judge Holtzoff on March 11, 1960 (judgment filed March 14, 1960) imposed concurrent sentences of twenty months to five years on each of counts 3 through 10 (R. 183, 6).

5. *Attempts to obtain an appellate determination on the merits.*

Petitioner's timely application to appeal *in forma pauperis* (R. 6-7) was on March 22, 1960, denied by Judge Holtzoff, who certified that the appeal "is frivolous and not taken in good faith" and added: "the defendant has had two trials and the jury convicted him both times on the counts on which he was sentenced" (R. 7). Thereupon petitioner, *pro se*, on April 15, 1960, filed timely petition with the Court of Appeals for leave to appeal *in forma pauperis* (R. 1-4). One issue raised related to Judge Holtzoff's refusal to disqualify himself; petitioner stated that the ground for asking Judge Holtzoff to disqualify himself was that in a hearing on a preliminary motion on January 22, 1960, shortly before the second trial,

> "Judge Holtzoff made the uncalled for, un-proven, and highly prejudiced remarks, that petitioner had terrorized a former government witness. Since such a charge has never been placed against, or proven against petitioner, the remarks by Judge Holtzoff show that he was prejudiced against petitioner even before the trial" (R. 3).

Petitioner further stated that when the motion had been presented "Judge Holtzoff bluntly refused to hear the peti-

tioner's reasons for presenting the motion before denying it" (R. 3-4).

On April 20, 1960, the Court of Appeals appointed the undersigned as petitioner's counsel (R. 5). On June 15, 1960, a 30-page memorandum in support of the petition to appeal *in forma pauperis* was filed in the Court of Appeals, setting forth three separate groups of substantial questions which appeared to be involved in the appeal (R. 5-30). Details will be discussed in the Argument section of this brief; the issues raised involved (A) the group of substantial questions relating to the validity of the indictment (R. 8-17), (B) the substantial questions relating to Judge Holtzoff's summary denial of motions that he disqualify himself (R. 17-19); and (C) substantial questions as to prejudice resulting from the prosecution's use of the co-defendant Artis' first-trial testimony (R. 19-27). The memorandum likewise set forth reasons why, in counsel's opinion, a transcript was necessary in order for petitioner's appeal to be properly evaluated by counsel and presented to the Court of Appeals (R. 7-8, 27).

On June 16, 1960, the Government answered that it appeared appropriate to furnish the transcript at Government expense; but the Government urged that until after the transcript became available, and petitioner's counsel had then filed such supplemental memorandum as he may deem appropriate, the Court of Appeals should hold in abeyance action on the petition for leave to appeal *in forma pauperis* (R. 31). A reply filed June 17, 1960 (R. 32-33) urged that leave to appeal *in forma pauperis* should be granted without further delay, since it was sufficiently clear that the appeal involved at least some substantial questions no matter what the transcript might disclose. It was further urged that the procedure suggested by the Government would be wasteful and unnecessarily pro-

longed; that it would involve a serious imposition on the time and energies of the Court of Appeals, a significant delay in the handling of criminal cases on appeal, an unwarranted enlargement of the elapsed time between the date of sentence and the date of final disposition of the appeal, and a fragmentation of the appellate disposition of *in forma pauperis* cases which would make the appellate process a kind of obstacle course for an indigent appellant which is wholly unlike the situation confronting a non-indigent appellant able to pay his way.

On July 1, 1960, the Court of Appeals directed that the stenographic transcript be prepared at the expense of the United States, and allowed the Government ten days after the filing of such transcript for submitting an opposition to the petition for leave to appeal *in forma pauperis* (R. 34).

The transcript accordingly became available on August 15, 1960. The Government, having applied for an extension of time, filed in the Court of Appeals on September 2, 1960, an opposition to the petition to appeal *in forma pauperis* (R. 35-40). The Government's opposition asserted that "none of the questions raised by petitioner are sufficiently substantial to warrant an appeal in forma pauperis" (R. 36), and that the questions "are not sufficiently substantial for this Court of Appeals to grant an appeal in forma pauperis" (R. 39).

On September 8, 1960, the undersigned filed a 26-page reply on petitioner's behalf (R. 40-63). The reply showed that the transcript had underscored the substantiality of the three groups of questions raised initially before the transcript became available (R. 41-54), and also that the transcript had brought to light two new substantial questions each of which called for appellate determination on the merits—namely, whether corroboration should be re-

quired to support a conviction based on testimony of an accomplice (R. 54-58), and whether the prosecutor had unfairly vouched for the veracity of Government witnesses (R. 58-62). In addition, the reply urged that, in the light of what the transcript actually showed, one of the substantial questions initially advanced—namely, Judge Holtzoff's failure and refusal to recuse himself—was error so manifest as to warrant summary reversal of the conviction (R. 44-50, 63).

The Court of Appeals did not hear oral argument on the petition to appeal *in forma pauperis*. It did not order the record in the case to be designated for purposes of appeal or transmitted to it from the District Court. It did not allow the case to be briefed on the merits, nor orally argued on the merits. It did not in any other manner purport to give the case a full appellate review. Instead, on November 4, 1960, it entered an order "that the petition for leave to prosecute an appeal in forma pauperis is denied" (R. 64). Chief Judge Miller and Judge Bastian concurred in the order; dissenting was Judge Bazelon, who "would grant the petition."

The petition for certiorari was filed *in forma pauperis* in this Court on November 16, 1960. The Government filed a brief in opposition on January 13, 1961, and petitioner's reply was filed on January 18, 1961. Among other things, the reply invited attention to the additional issue requiring appellate determination in the light of the intervening Court of Appeals decision in *Barry* v. *United States* (page 23, *supra*).

Action on the petition for certiorari apparently was held in abeyance pending disposition of *Lurk* v. *United States*, 366 U.S. 712, which involved similar questions as to *in forma pauperis* procedure on direct criminal appeals in

the District of Columbia.* Shortly after this Court's decision reversing the Court of Appeals in *Lurk*, certiorari was granted in the present case on June 19, 1961 (R. 184). 366 U.S. 959.

Summary of Argument

In the Court of Appeals an abundant showing was made on petitioner's behalf that the appeal raised issues which were "not plainly frivolous". The refusal of the Court of Appeals to allow the appeal to be heard and determined on the merits was a plain departure from the standards expressed by this Court in *Ellis* and related cases. It involves, moreover, a gross and unlawful discrimination against petitioner because of his indigence.

This Court might accordingly remand the case to the Court of Appeals for an initial determination there of all the issues on the merits. Strong considerations exist under the circumstances of this case, however, for this Court instead to make an appellate determination of the merits at this time. Accordingly the issues will be fully briefed on the merits, so that the case can be definitively disposed of here, without further delay, if this Court deems such action to be just under the circumstances.

The District Court's denial of the motion to dismiss the indictment raises a number of important questions and involves a serious misunderstanding of this Court's *Costello* decision. *Costello* held that an indictment is not subject to attack when it is based solely on hearsay evidence. But *Costello* did not in any way preclude attack on an indictment when a concrete and specific showing is made before the trial that the grand jury based its action on

* A brief *amicus curiae* on behalf of this petitioner was filed in *Lurk*, urging reversal.

important testimony which was false and perjured. Moreover, an indictment based on substantial false and perjured testimony is not, as the District Court thought, automatically salvaged by the fact that "other competent evidence" implicating petitioner may have been before the grand jury. The test rather is whether it can be known with reasonable certainty that the grand jury would have returned the indictment anyway, even if the substantial perjured testimony implicating petitioner had not been presented to it or even if the grand jury had known that such testimony was perjured; and here it cannot properly be concluded that the grand jury would have returned the indictment anyway. The grand jury transcript, which the District Court examined *in camera*, was improperly, and in this case without any justification, withheld from defense counsel, depriving the defense of the opportunity to have the necessary facts relating to this matter; and in any event, at the very least an appellate *in camera* examination is required, but has never been made, to determine the correctness of the District Court's conclusion that in fact there was other competent evidence before the grand jury. Finally, and of great importance, the motion papers required that the District Court should have made a factual inquiry—which it totally failed to do—into whether Government agents were responsible for inducing the false and perjured testimony for presentation to the grand jury.

Judge Holtzoff should have granted the motions that he disqualify himself and permit the case to be tried before another judge. His hostility to petitioner and petitioner's case—as manifested by his comments during an oral argument on a motion shortly before this trial began—made it highly inappropriate for him to proceed to try the case, and particularly so in the light of defense objections.

Serious prejudicial errors were committed in connection with the prosecution's being allowed to use extensive testi-

mony implicating petitioner which had been given at the first trial by the co-defendant Artis, who was unavailable as a witness at this second trial. Judge Holtzoff's exclusion of Artis' subsequent recantation, as well as of Artis' other contradictory admissions, was highly prejudicial and unfair to petitioner. Indeed, it means that, by reason of the accident of the witness' intervening death or other unavailability, first-trial testimony shall be unconscionably immunized against subsequent impeachment, even though the impeachment takes the form of a total written recantation by the witness which shows conclusively that at the first trial he was a liar and a perjurer. Judge Holtzoff further erred in failing and refusing to inform the jury of the deficiencies and weaknesses he himself had noted in Artis' testimony at the first trial. Judge Holtzoff erred, and failed to meet his obligations under the Jencks Act, when he refused to require the prosecution to produce the original of the Artis statement of December 2, 1958. He likewise erred in admitting damaging hearsay against petitioner on the Artis matter. Indeed, under the unusual circumstances of this case, when the Artis matter is looked at as a whole it becomes clear that Judge Holtzoff should have sustained defense objections to the entire Artis first-trial testimony.

The prosecutor in his summation, by inexcusably vouching for the veracity of Government witness, deprived petitioner of a fair trial.

Judge Holtzoff's charge was defective in that it permitted conviction to be based on the uncorroborated testimony of an accomplice (here Artis)—a rule of law which has been widely followed in the lower federal courts but which should be rejected by this Court, particularly in the light of modern developments in the criminal law. Judge Holtzoff's charge was also fatally defective in omitting to define an essential element of the offenses.

For these reasons—separately, and even more so in the aggregate—the merits of the appeal are with petitioner and his conviction should be reversed. In addition, appropriate directions should be given to the District Court with respect to the motion to dismiss the indictment.

ARGUMENT.

I.

The Court of Appeals' Refusal to Allow an Appeal in Forma Pauperis and to Hear and Determine the Appeal on the Merits Constituted a Plain Departure From Established Law.

The fair and just handling of *in forma pauperis* cases constitutes one of the major problems confronting the courts in the administration of federal criminal justice. This is particularly true within the District of Columbia Circuit, where *in forma pauperis* business is especially heavy.

To provide all the federal courts with clear and unequivocal guidance as to the standards applicable to allowance of *in forma pauperis* appeals, this Court held in *Ellis* v. *United States*, 356 U.S. 674, 674-675, that:

> "The only statutory requirement for the allowance of an indigent's appeal is the applicant's 'good faith'. 28 U.S.C. §1915. In the absence of some evident improper motive, the applicant's good faith is established by the presentation of any issue that is not plainly frivolous. *Farley* v. *United States*, 354 U.S. 521. The good-faith test must not be converted into a requirement of a preliminary showing of any particular degree of merit. Unless the issues raised are so frivolous that the appeal would be dismissed in the case of a

nonindigent litigant, Fed. Rules Crim. Proc. 39(a), the request of an indigent for leave to appeal in forma pauperis must be allowed."

In far too many cases the teachings of *Ellis*, instead of finding a sympathetic reception in the District of Columbia Circuit, have met with outright rejection. Time and again, as in *Ellis*, this Court has found it necessary and appropriate to take corrective action reversing the District of Columbia Circuit, so that the Court of Appeals would be required by this Court's specific direction to hear and determine on the merits an *in forma pauperis* criminal appeal. *Edwards* v. *United States*, 355 U.S. 36; *Hill* v. *United States*, 356 U.S. 704; *Cash* v. *United States*, 357 U.S. 219; *Hansford* v. *United States*, 357 U.S. 578; *Smith* v. *United States*, 358 U.S. 281; *Smith* v. *United States*, 361 U.S. 38; *McAbee* v. *United States*, 361 U.S. 537; compare *Willis* v. *United States*, 362 U.S. 216. Most recent in the series is *Lurk* v. *United States*, 366 U.S. 712, decided near the end of last term. In every one of these cases the District of Columbia Court of Appeals had cut off an indigent appellant from having his appeal heard and determined on the merits—just as it has done with this petitioner—and in every instance this Court reversed.

The fact that so many reversals have been necessary—and that despite them the Court of Appeals has continued on its erroneous course of conduct—is eloquent proof of the gross misconception which prevails in the District of Columbia Circuit concerning applicable legal standards on this subject. Abundant showing was made in the Court of Appeals that this petitioner's appeal raised questions substantial and clearly non-frivolous. But the Court of Appeals—despite the wide gap which has been shown to exist between its views and the unanimous views of this Court—has nevertheless persisted in applying its own erroneous

views as to the governing standards. In this area the District of Columbia Court of Appeals repeatedly has manifested a propensity to differ rather than defer.

If petitioner had been a non-indigent appellant, his appeal would in fact have been heard and determined on the merits by the Court of Appeals. For example, it is understood that there are very few cases in recent years—indeed virtually none at all—where the District of Columbia Court of Appeals dismissed as frivolous a direct criminal appeal brought to it on a paid basis by a non-indigent appellant.* In sharp contrast, during the fiscal year 1960 alone there were about 30 direct criminal appeals by indigent appellants in which the District of Columbia Court of Appeals denied leave to appeal *in forma pauperis*. No principles of natural selection—except those fostered by basically discriminatory practices—would account for a situation in which indigent appellants so frequently are held to be presenting frivolous appeals from criminal convictions but appellants able to pay their way are never, or virtually never, held to be doing so.

Indeed, anyone who reads the month-by-month and year-by-year output of opinions by the District of Columbia Court of Appeals in non-indigent criminal cases would have no doubt that petitioner's appeal, if it had come from a non-indigent appellant, would have been fully heard and determined on the merits. Even a casual inspection will

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*While the search made has not been exhaustive, only one instance has been found in recent years where the Court of Appeals for the District of Columbia Circuit dismissed as frivolous a non-indigent's direct appeal in a criminal case. This was in the recent case of *Brown* v. *United States*, 293 F.2d 149 (1961)—and even in this one case the appeal was dismissed only after being fully briefed and orally argued on the merits. Moreover, in *Young* v. *United States*, 105 App. D.C. 415, 416, 267 F.2d 692, 693 (1959), the Court of Appeals itself stated, as to criminal appeals, that "Prepaid appeals are rarely dismissed."

show that the Court of Appeals' opinions in its non-indigent criminal appeals are filled with appellate determinations on the merits of issues far less substantial than the issues petitioner tendered.

These circumstances emphasize the gravity of the unlawful and improper discrimination being practiced against petitioner—as it has also been practiced against Ellis and Lurk and others in the District of Columbia—because of indigence. This is discrimination of the type which the Fourteenth Amendment prohibits the States from practicing. *Griffin* v. *Illinois*, 351 U.S. 12; *Eskridge* v. *Washington State Board*, 357 U.S. 214; *Ross* v. *Schneckloth*, 357 U.S. 575; *Burns* v. *Ohio*, 360 U.S. 252; *Douglas* v. *Green*, 363 U.S. 192; *McCrary* v. *Indiana*, 364 U.S. 277; *Smith* v. *Bennett*, 365 U.S. 708. "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. . . . [A]t all stages of the proceedings the Due Process and Equal Protection Clauses [of the Fourteenth Amendment] protect persons like petitioners from invidious discriminations." *Griffin* v. *Illinois*, *supra*, 351 U.S. at 18. This type of discrimination is at least equally violative of the Fifth Amendment's Due Process Clause, and at least equally violative of the entire spirit of fairness and equality upon which our judicial institutions are founded.

The Court of Appeals has inflicted on petitioner because of his indigence a denial of justice which should be made impossible under a Constitution whose Preamble recognizes the great purposes of our free society to "establish Justice" and to "secure the Blessings of Liberty". The poor as well as the rich are entitled to have their criminal

appeals fully heard and determined on the merits—at least when issues "not plainly frivolous" are raised by the appeal. In the administration of federal criminal justice there is no room for discriminatory procedures which would relegate the indigent to a kind of second-class citizenship. Indigent appellants must not be made beggars for the justice which every non-indigent appellant can obtain from the Court of Appeals as a matter of regular course.

A word should be added concerning the brief in opposition which the Government filed in this Court in the present case, comparable to what it also argued in this Court in *Lurk*. The Government took the wholly spurious position that petitioner's appeal had "in effect already been granted and considered" by the Court of Appeals and "in effect the case was presented to the court below on its merits and was presumably disposed of on that basis". The simple answer to this is that plainly it is not so. Since such argument by the Government has now been totally rejected by this Court's decision in *Lurk*, perhaps the Government will not renew it here in the brief on the merits. In any event, no amount of misdescription by the Government can alter the fact that in this case, as in *Lurk*, what the Court of Appeals did was to deny, and not to grant, an appellate review of the merits. The Government tendered its strange assertion to this Court despite all the facts: the Court of Appeals did not order that leave to appeal be granted, but instead ordered that such leave be denied; the Court of Appeals did not order the record in the case to be designated for purposes of appeal or to be transmitted to it from the District Court for review; the Court of Appeals did not allow the case to be briefed on the merits; the Court of Appeals did not allow the case to be orally argued on the merits, or even otherwise; the Court of Appeals did not render any opinion or order on the merits; the Court of Appeals did not express any views

whatever on the merits of any of the issues raised; the Court of Appeals did not say or show that it had given any particular consideration to any of the issues raised; and the Court of Appeals did not in any other manner purport to give the case full appellate review.

In short, the Court of Appeals has been following a course of action which would scuttle *Ellis* and would defeat the great principles of Equal Justice under Law. A long line of decisions establishes that this cannot be accomplished as long as this Court sits.

It is evident that petitioner has been denied the appellate review on the merits to which he clearly is entitled. As has been shown, it was enough under *Ellis* that the issues presented to the Court of Appeals be "not plainly frivolous". That the issues were "not plainly frivolous" appears in the record printed for this Court's use and will be discussed, as to each issue, in succeeding portions of this brief.

One possible disposition of the case would be to remand it to the Court of Appeals for initial determination there of all the issues on the merits. That is the course which this Court has followed in *Lurk* and in various other cases. Another possible disposition would be for this Court to make its own appellate determination on the merits of some, or perhaps all, of the issues involved. That is the course which this Court has followed in cases such as *Holiday* v. *Johnston*, 313 U.S. 342, and *Pollard* v. *United States*, 352 U.S. 354, where leave to appeal *in forma pauperis* had likewise been denied by the courts below. Considerations which seem strongly persuasive towards the latter course will be discussed (pages 69-70, *infra*). In any event, in order to put the case in a posture where the appellate determination could be rendered by this Court

on the merits at this time, the various issues in the case will be fully argued on the merits in this brief, and not merely presented in the somewhat more abbreviated form which would be adequate to establish their "not plainly frivolous" nature.

II.

Numerous Prejudicial Errors Were Committed in Denying Petitioner's Motion to Dismiss the Indictment.

The errors on this phase of the case must be assessed in the light of the issues raised by the motion and its supporting documents. These issues were, first, that the indictment had been returned by the grand jury as a result of testimony by Thompkins, which Thompkins now stated in writing to have been false and perjured, and second, that such false and perjured testimony by Thompkins had been induced by Government agents (pages 7-9, *supra*).

A. *The indictment is open to attack on the ground that the grand jury based its action on important testimony shown before the trial to have been false and perjured.*

To the extent that Judge McGuire relied on some principle that the nature of the evidence before the grand jury is not subject to any inquiry whatsoever for the purpose of testing the validity of the indictment, his ruling goes far beyond existing precedents and into an area where the law appears to be largely unresolved. *Costello* v. *United States*, 350 U.S. 359, was cited for support. *Costello*, however, was a very different case; as this Court said, 350 U.S. at 359, it presented for decision the single question whether a defendant might be required to stand trial and a conviction might be sustained where the only evidence presented to the grand jury which indicted him was hear-

say evidence. This Court reviewed the history of the grand jury as an institution and concluded that the fact that all the evidence presented to the grand jury is hearsay, which would not be admissible at the trial, does not defeat the validity of the indictment. In other words, grand jury proceedings are not to be reviewable for the purpose of ascertaining whether they have been conducted in accordance with the rules of evidence; there is no substantive requirement that the rules of evidence be strictly followed in grand jury proceedings, "in which laymen conduct their inquiries unfettered by technical rules." 350 U.S. at 364. Accordingly this Court said, 350 U.S. at 363, and later repeated in *Lawn* v. *United States*, 355 U.S. 339, 349-350:

> "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."

The policy considerations supporting this result would appear to be essentially inapplicable to a case where it affirmatively appears that false and perjured testimony constituted the basis—or a substantial basis—for the action taken by the grand jury.[10] The issue raised by perjurious

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[10] Moreover, to reinforce the "not plainly frivolous" nature of this issue, it was emphasized to the Court of Appeals (R. 12) that an elaborate review of federal decisions appears in an Annotation in 100 L.Ed. 404-412 (following the *Costello* opinion), entitled "Competency or Sufficiency of Evidence Before Grand Jury as Affecting Validity of Indictment or Conviction in Federal Court". The cases there collected do not reflect any express line of authority in the federal courts on the question whether, when there is a showing that important evidence brought before the grand jury was false and perjured, the indictment should be dismissed. No decision has been found—and none was cited in the Government's opposition filed in the Court of Appeals—either in this Court or in the District of Columbia Court of Appeals or in the Court of Appeals of any other circuit, whether before or after *Costello*, which forecloses or indeed even passes upon such question.

testimony given before the grand jury is not simply a question as to technical rules of evidence. Indeed there is nothing very technical about this at all; laymen are perfectly capable of understanding and reacting to the phenomenon of having been lied to. Rather the issue is what the interests of justice require when before the trial the perjury is discovered and it is shown that the grand jury has relied substantially on wilfully false and perjured testimony in making up its mind to return the indictment. Moreover, the present case is not one where there are merely some vague "unsupported suspicions," *Lawn* v. *United States, supra*, 355 U.S. at 350, of such perjury. Thompkins' direct and specific written statements were a part of the motion; no denial was filed by the Government; and in addition, defense counsel made Thompkins available as a witness if the court should want to take his testimony (page 9, *supra*). When such a situation is made duly manifest to the court before the trial has begun—and indeed before the statute of limitations has run, so that fresh grand jury consideration of whether a new indictment ought to be returned against the particular defendant is in no way precluded—then the proper administration of criminal justice requires that the challenged indictment be set aside.

B. *An indictment based on substantial false and perjured testimony is not automatically salvaged by the fact that "other competent evidence" may have also been before the grand jury.*

As noted, Judge McGuire after an *in camera* inspection, concluded that the grand jury had sufficient other competent evidence against petitioner to support including petitioner in the indictment (page 10, *supra*). Challenge is here made, as it was in the Court of Appeals (R. 12-14), to the standard Judge McGuire applied—namely, that where signifi-

cant false and perjured testimony given before the grand jury has formed a substantial basis for the indictment, nevertheless such perjury is immaterial so long as there was presented to the grand jury some other competent evidence implicating the particular defendant.

A closer formulation of the proper criterion in such a case would appear to be whether it can be known with reasonable certainty that the grand jury would have returned the indictment anyway—even if the false and perjured testimony had not been brought before it or even if the grand jury had known that in fact such testimony was false and perjured. If that is the more appropriate criterion, then this indictment should have been dismissed against petitioner and the matter sent back to a grand jury for fresh consideration without the use of Thompkins' wilfully false and perjured testimony implicating petitioner. Moreover—to borrow the language of this Court and of the Court of Appeals in a somewhat different situation, *Griffin* v. *United States*, 336 U.S. 704, 709; 83 App. D.C. 351, 353, 183 F.2d 990, 992 (1949)—on this record it would certainly be "too dogmatic, on the basis of mere speculation, for any court to conclude" that the grand jury would not have attached significance to the fact that Thompkins' important testimony was false and perjured if such fact had been available to the grand jury. Indeed, "we cannot know whether the grand jury would have included in its indictment a charge" against this petitioner, compare *Stirone* v. *United States*, 361 U.S. 212, 219, if the substantial perjured testimony of Thompkins had not been brought before it.

This Court has said with respect to the situation of false and unreliable testimony of an important prosecution witness at a trial: "The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them". *Mesarosh* v.

United States, 352 U.S. 1, 14. Equally, the government of a strong and free nation does not need indictments based upon such testimony, and it cannot afford to abide with them.

C. *The grand jury transcript was erroneously withheld from defense counsel.*

As already stated (pages 10-11, *supra*), the District Court denied defense counsel's motion to inspect the grand jury transcript. This effectively and erroneously deprived the defense of an opportunity to make such argument as might be appropriate, on the basis of actual examination of the transcript, to the effect that Thompkins' false and perjured testimony constituted the sole basis, or virtually the sole basis, for the grand jury's having indicted petitioner.

Grand jury proceedings normally are surrounded by secrecy. But such secrecy is to be broken where there is a compelling necessity, or where there is a showing of good cause—such as, that without the transcript the defense would be greatly prejudiced or an injustice would be done. *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 682-684; *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395; *DeBinder* v. *United States*, 292 F.2d 737, 739 (D.C. Cir. 1961); compare *Parr* v. *United States*, 265 F.2d 894, 901-904 (5th Cir. 1959), reversed on other grounds, 363 U.S. 370. "After the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 234.

Here the ends of justice required it. Thompkins had expressly admitted his perjury, so no proper purpose could have been served by keeping Thompkins' grand jury testimony undisclosed. The case had, moreover, already gone through a first trial (with conviction reversed by the Court

of Appeals), so that continued secrecy of the grand jury transcript as to other witnesses would not even have served the purpose of enabling the prosecution to obtain the usual benefits of surprise in presenting its evidence at the trial. Under the circumstances, there appear to have existed no significant considerations in favor of secrecy which should have outweighed the need of disclosure in order to enable the defense to have the facts reasonably necessary for the effective presentation of its position. Defense counsel showed "a particularized need" for the grand jury minutes, *Pittsburgh Plate Glass Co.* v. *United States, supra,* 360 U.S. at 400, and accordingly the minutes should have been made available to him.

D. *In any event, appellate review is required to determine whether the District Court erred in determining there was sufficient other competent evidence before the grand jury.*

Even if refusal to disclose the grand jury transcript to defense counsel were sustained, the proper exercise of appellate responsibilities requires that an appellate court review the correctness of the District Court's *in camera* determination that there actually was other competent evidence implicating petitioner before the grand jury. The cases just cited show that a trial judge's discretion in deciding whether to disclose the grand jury transcript is not absolute, and that it is subject to appellate review. Moreover, where the trial court examines the grand jury transcript *in camera,* and denies it to the defense, the minimum obligation of the appellate court is to make a similar *in camera* examination to determine whether the trial court's conclusion was right or wrong and whether the trial court's discretion was abused. *United States* v. *Spangelet,* 258 F.2d 338, 341-342 (2nd Cir. 1958); *United States* v. *Zborowski,* 271 F.2d 661 (2nd Cir. 1959); *United States* v. *Mc-*

Keever, 271 F.2d 669, 672-673 (2nd Cir. 1959); *United States* v. *Hernandez*, 282 F.2d 71 (2nd Cir. 1960); compare *Palermo* v. *United States*, 360 U.S. 343, 355; *Rosenberg* v. *United States*, 360 U.S. 367, 369. This is required by the need for both fairness and the appearance of fairness. Even now, the petitioner's counsel cannot know what is in the grand jury transcript. Petitioner must accordingly rely upon careful appellate scrutiny *in camera* of the grand jury transcript,[11] or else there would be no appellate review at all on the questions whether, apart from Thompkins' perjury, there was indeed any other evidence before the grand jury, and if so whether—under whatever criterion may be applicable—such evidence was adequate to sustain the indictment against the challenge made.

E. *In any event the District Court, before determining that the indictment should be upheld, should have made a factual inquiry into whether Government agents were responsible for inducing false and perjured testimony by Thompkins for presentation to the grand jury.*

The motion to dismiss the indictment, while the allegations in the exhibits attached to it were perhaps somewhat inartistically expressed (pages 7-9, *supra*), sufficiently raised this question so that the District Court should have made an inquiry into the facts. Indeed the oral argument on the motion makes it clear that Judge McGuire was satisfied such issue was squarely raised, since he said that as he understood its gist, "it is to the effect that a witness who appeared before the Grand Jury was promised if he went before the Grand Jury and testified falsely

[11] Since the Court of Appeals denied leave to appeal in forma pauperis without ever providing for the record to be designated or transmitted to it by the District Court (compare note 2, *supra*), the grand jury transcript was never—so far as appears—brought before the Court of Appeals even for an *in camera* examination.

against the defendant in this case, he, himself, would not be prosecuted" (R. 69; page 9, *supra*). Yet, as noted (page 9, *supra*)—and even though no written denial or other answer had been interposed by the Goverment—Judge McGuire elected to make no inquiry into the actual facts and did not call Thompkins to testify despite the fact that Thompkins was available to the court as a witness on that day.

The long line of decisions beginning with *Mooney* v. *Holohan*, 294 U.S. 103, and extending through *Alcorta* v. *Texas*, 355 U.S. 28, *Napue* v. *Illinois*, 360 U.S. 264, and *Wilde* v. *Wyoming*, 362 U.S. 607, have established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must be set aside under the Due Process Clause; that the same result obtains when the State, although not soliciting false evidence, allows false evidence to go uncorrected when it appears; and that there is a constitutional requirement for such issues to be cognizable not merely by direct appeal but also by collateral attack upon the conviction. Although no case has been found expressly deciding whether these principles likewise apply in passing upon the validity of an indictment, as a matter of principle the taint would appear to be comparable. The obligation to wipe out the taint by dismissing the indictment is equally compelling, both as a matter of constitutional law under the Due Process Clause of the Fifth Amendment and as a matter of proper judicial supervision over the administration of criminal justice in the federal courts.

Accordingly, on the present record the District Court should have made inquiry into the facts—which it totally failed to do—to determine whether Government agents were in fact responsible for inducing Thompkins' false and perjured testimony, implicating petitioner, for presenta-

tion to the grand jury. If they were, the indictment thereupon returned against petitioner is most clearly "a fruit of the poisonous tree", *Nardone* v. *United States*, 308 U.S. 338, 341, and it would be unconscionable for the indictment of petitioner to be allowed to stand, particularly in a case such as this where timely challenge was made to it before the trial.

Indeed, if one were to accept the argument of complete non-reviewability made by the Government's opposition filed in the Court of Appeals, then this would mean that a federal prosecutor could knowingly and wilfully induce a witness to give false and perjured testimony before a grand jury; that such false and perjured testimony, knowingly and wilfully induced by the prosecutor, could constitute the sole evidence connecting the defendant with the alleged offense and the sole basis for the grand jury's indicting the defendant, and yet the indictment would be wholly immune from attack in the courts. If the grand jury's "most valuable function" is "not only to examine into the commission of crimes, but to stand between the prosecutor and the accused", *Hale* v. *Henkel*, 201 U.S. 43, 59; *Hoffman* v. *United States*, 341 U.S. 479, 485, then surely it is essential to prevent the grand jury's processes from being debased by such a prosecutor. Otherwise there would be put into the hands of an evil or corrupt or overzealous prosecutor an unreviewable power not only to snuff out the rights of the defendant but also to impose the unconscionable results upon both an unsuspecting grand jury and the court itself. It would make the grand jury and the court serve as instruments for such a prosecutor in carrying out his evil design, instead of as the bulwarks of a free society in the fair and impartial administration of justice.

Neither *Costello* nor *Lawn* nor (so far as is known) any other federal decision has ever held or intimated that such a far-reaching proposition can be the law. Plainly it should not ever become the law.

III.

Judge Holtzoff Should Have Disqualified Himself and Permitted the Case to Be Tried Before Another Judge.

The circumstances surrounding Judge Holtzoff's summary denial of motions that he disqualify himself have been related (pages 11-13, *supra*). From them it appears that Judge Holtzoff, shortly before the second trial, had declared in open court that petitioner had "terrorized" a Government witness, Clarence Thompkins, and Judge Holtzoff also had declared that, as to Thompkins' recantation statement, "I imagine that statement was induced by Coppedge."

In the circumstances the interests of justice clearly required that Judge Holtzoff recuse himself and allow the case to be tried before another judge.

The Government's opposition filed in the Court of Appeals disagreed with petitioner's position on two grounds (R. 37-38). Both of the Government's grounds were demonstrably devoid of merit; and in any event, neither one of them detracted in the slightest from the substantiality of the issues presented for an appellate determination on the merits.

First, said the Government (R. 37), no statutory affidavit of prejudice had been filed under 28 U.S.C. §144. But this is by no means the only proper way, under all circumstances, for questions as to disqualification for prejudice to be given consideration. Indeed, in *Offutt* v. *United*

States, 348 U.S. 11, as in *Cooke* v. *United States*, 267 U.S. 517, 539, this Court itself directed that a second trial should be before a different judge. Other cases disclose situations where motions, or appropriate protestation on appellate review, have been deemed adequate and sufficient methods for raising the issue of whether the requisite standards have been adhered to. *Whitaker* v. *McLean*, 73 App. D.C. 259, 118 F.2d 596 (1941); *Moskun* v. *United States*, 143 F.2d 129 (6th Cir. 1944); *Knapp* v. *Kinsey*, 232 F.2d 458, 465-467 (6th Cir. 1956), certiorari denied, 352 U.S. 892; *Crowe* v. *Di Manno*, 225 F.2d 652 (1st Cir. 1955). Perhaps the statutory affidavit may be more of a requisite when the bias alleged rests on matters outside the record, but here the grounds arise out of comments made by the judge on the record in these very proceedings. As the Court of Appeals for the District of Columbia Circuit stated in *Whitaker* v. *McLean*, *supra*:

> "Few, if any judges would make the reported remarks in the course of a trial, unless they had developed a definite and positive hostility to plaintiff and his case . . . . [A] right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial."

The principles thus expressed so clearly in a civil case apply with even greater force to criminal cases.

Second, and what it claimed to be "more important", the Government's opposition filed in the Court of Appeals relied upon what it stated to be "the fact that Thompkins was indeed terrorized by petitioner" (R. 38). For this asserted fact the Government's opposition sought support in statements made by the Court of Appeals in its opinion on petitioner's successful appeal from the first conviction. 106 App. D.C. 275, 276, 279, 272 F.2d 504, 505, 508. But it is

entirely clear that on the first appeal the Court of Appeals was not making any determination whatsoever as to whether petitioner in fact had or had not terrorized Thompkins; the Court of Appeals held that petitioner's right to a fair trial had been prejudiced by lurid newspaper accounts of an episode which easily might have led the jury to draw such a conclusion (see page 6, *supra*). No testimony was ever taken either from petitioner or from Thompkins bearing on whether any such terrorization had actually occurred. Whatever impression or belief Judge Holtzoff may have had, or whatever Judge Holtzoff may have surmised, concerning whether any such terrorization had occurred, was based either on his own erroneous recollection or on what persons other than petitioner and Thompkins had asserted. Moreover, in Thompkins' letter (see page 8, *supra*), written after the supposed "terrorization" and prior to sentencing of petitioner at the first trial, Thompkins had expressly written to Judge Holtzoff that (R. 48):

> "On December 10—58 I was brought into Your Honor's court to testify falsely, which I refused to do so, and was found guilty of criminal contempts of court. It was told to Your Honor, by attorney Letterman and Mr. Flannery that I was in fear of one of the defendant in the case, which is not true at all."

Essentially the Government opposition's position in the Court of Appeals appeared to be that there is no unfairness in compelling that a defendant be tried before a manifestly hostile or prejudiced judge, provided the hostility or the prejudice has some factual foundation. Such cannot be the law in the federal courts generally, and certainly should not be allowed to become the law in the District of Columbia, where the availability of a substantial number of trial judges makes the problem of recusation less difficult than it might be in a district having customarily

only a single federal judge. But in any event, no actual court inquiry or determination ever was made by Judge Holtzoff or anyone else which would establish that petitioner had actually terrorized Thompkins. Hence it could not be said that the hostility manifested by Judge Holtzoff was sufficiently founded on fact to warrant overlooking its disruptive influence on the fair and proper administration of justice.

In the federal courts no defendant should be compelled to go to trial before a judge who, before the trial has begun, has manifested "a definite and positive hostility" to the defendant and his case. *Whitaker v. McLean, supra.* Having displayed such a firm degree of feeling against petitioner and against evidence which the defense might seek to adduce at the trial, Judge Holtzoff should not have proceeded to preside at this trial.

In any particular case it may be somewhat difficult to identify with certainty what are the exact respects in which the existence of hostility from the outset on the part of the judge has actually affected the conduct of the trial and its outcome. In many ways, both obvious and subtle, it may work to the severe prejudice of a defendant, no matter how conscientiously the judge may strive to avert this. It is likely to be especially important in areas where the trial judge's actions rest within the realm of judicial discretion—such as certain types of rulings on evidence, or the judge's comment or refusal to comment to the jury on the testimony, or the sentence imposed. Moreover, a defendant may well be more reluctant to take the stand to testify if there has been a clear manifestation before the trial begins that the judge is hostile to the defendant or to the defendant's case.

In any event, these are intangibles which a fair administration of the criminal law should make it wholly

unnecessary to explore. The appellate court should not be put in the position of having to make an almost impossible effort, after the trial, to weigh exactly how much the defendant has actually suffered from a judge's predisposition of hostility. As this Court said in *Berger* v. *United States*, 255 U.S. 22, 36:

> "The remedy by appeal is inadequate. It comes after the trial, and if prejudice exists, it has worked its evil, and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient."

Rather, the remedy is to transfer the case to another judge for trial and thus to prevent the question from arising at all. Here this could very easily have been achieved if Judge Holtzoff had recused himself and requested that another judge be assigned to the trial.

The degree of hostility manifested before the trial plainly surpassed acceptable bounds. It would have been most appropriate if Judge Holtzoff himself had recognized this and had on his own initiative transferred the case to another judge. Failing this, he should have done so in response to defense counsel's two oral motions.

Our legal system not only must do justice; it also must "satisfy the appearance of justice". *Offutt* v. *United States*, 348 U.S. 11, 14; *Levine* v. *United States*, 362 U.S. 610, 616; *In Re Murchison*, 349 U.S. 133, 136. The present trial has failed in both respects, and on these grounds the conviction should be reversed.

IV.

Serious Prejudicial Errors Were Committed by Judge Holtzoff in Connection With the Prosecution's Being Allowed to Use Extensive Testimony Given at the First Trial by the Co-defendant Artis, Who Was Unavailable as a Witness at This Second Trial.

As has been shown (pages 14-19, *supra*), a number of important issues requiring appellate determination arose out of the prosecution's use here of Artis' first-trial testimony.

A. *Judge Holtzoff's erroneous exclusion of Artis' subsequent recantation, as well as of Artis' other contradictory admissions.*

The reasons given by Judge Holtzoff for totally excluding Artis' recantation statement (page 16, *supra*) have no sound foundation in the law. The fact that the recantation was not notarized certainly is irrelevant to its admissibility, though conceivably it might be one of many circumstances to be taken into account by a jury in considering the weight to be attached to it. As to the genuineness of the Artis signature which twice appeared on the recantation statement, petitioner's trial counsel pointed out that there were already in evidence in the case one or two money orders bearing Artis' signature which provided a basis of comparison, and in addition petitioner's trial counsel immediately accepted Judge Holtzoff's initial suggestion that the recantation statement be turned over to the FBI for a handwriting comparison (R. 92). The fact that the body of the statement, other than Artis' two signatures, was in a handwriting which Judge Holtzoff thought he recognized as being "the handwriting of some gentleman who is an inmate of the penitentiary" was likewise totally

irrelevant to the admissibility of the recantation statement. From the standpoint of the admissibility of this important evidence which would have gravely impeached the Artis testimony, no explanation was suggested why it is any the more questionable for an indigent inmate to employ a fellow inmate as an amanuensis (which is often a practical necessity), than it would be for him to use a typewriter.[12] Judge Holtzoff's reasons for depriving the jury of all knowledge of this recantation statement are totally unsupportable.

As for Judge Holtzoff's further observation that admission of Artis' recantation would be "in violation of the rules of evidence" (page 16, *supra*), only recently this Court said: "It is, of course, an elementary rule of evidence that prior statements may be used to impeach the credibility of a criminal defendant or an ordinary witness." *Grunewald* v. *United States*, 353 U.S. 391, 418. No different rule can properly be applied in criminal cases where, as here, a prosecution witness who at the first trial has implicated the defendant makes statements thereafter not merely impeaching but entirely retracting his testimony, and the witness then dies or becomes otherwise unavailable before the second trial. Indeed, if the rule were otherwise, a defendant might be convicted at a first tral on the basis of testimony which the witness himself later repudiated as wholly perjurious; because of the accident that the witness had died or become otherwise legally unavailable between the time of the repudiation and the time of the second trial, the prosecution could nevertheless use such first-trial testimony without the jury ever finding out that the testimony had been repudiated. By reason of the witness' intervening death or other unavailability, the testimony of liars and perjurors would be forever immunized against impeach-

[12] Actually, the statement is written out in a kind of hand printing, which is a reasonably clear indication that the amanuensis was used as a substitute for a typewriter.

ment; it could be used, and used one-sidedly, at a second trial no matter how total the recantation or the refutation might be.

No system of justice could risk sending innocent men to prison on so flimsy a foundation. Such unconscionable results would not be consistent with the Due Process Clause nor with the principles of fundamental fairness and of sound policy required in the administration of criminal justice in the federal courts.

To the extent that the closely-divided decision in *Mattox* v. *United States*, 156 U.S. 237, 244-250, may appear to be to the contrary—although *Mattox* did not involve a subsequent written recantation signed by the witness himself—it should be noted that the principles expressed in *Mattox* were soon limited by this Court in *Carver* v. *United States*, 164 U.S. 694, 698, and the problem does not appear to have come back to this Court for further consideration in more than sixty years. In any event, it is clear that *Mattox* cannot be reconciled with later developments in the criminal law. *People* v. *Collup*, 27 Cal.2d 829, 167 P.2d 714 (1946); *Harschbert* v. *State*, 117 Tex.Cr. 504, 506-508, 35 S.W.2d 430, 431 (1930); compare *Grunewald* v. *United States*, *supra*; 3 Wigmore, Evidence §1032. In the *Collup* case, for example, the Supreme Court of California, overruling several of its earlier decisions, adopted the views of the dissenting opinion in *Mattox*, from which it quoted the following passage with approval (from 156 U.S. at 257-258):

> "Undoubtedly, the credit of witnesses testifying under oath should not be assailed by evidence of their statements made elsewhere, without affording them, if practicable, in justice to them and to the party calling them, with an opportunity to deny, explain, or admit; but it must not be overlooked that the primary object

> of the trial is not to vindicate the truth or consistency of witnesses, but to determine the guilt or innocence of the accused. If the evidence tending to show that the testimony of an essential witness cannot be relied on, because he has made contradictory statements elsewhere and at other times, is valid and admissible, as the authorities all concede, why should the right to put in such evidence be destroyed by the incidental fact that the witness, by reason of death, cannot be produced to deny or to admit that he made such statements? Does not the necessity call for a relaxation of the rule in such a case?"

Mattox is out of harmony with "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Rule 26, Federal Rules of Criminal Procedure. *Mattox* should not be revived and, if this be deemed necessary to establish its total inapplicability to a case such as the present one, then it should be expressly overruled.

From the foregoing it appears that Judge Holtzoff improperly excluded important probative evidence, showing subsequent admission by Artis that his first-trial testimony implicating petitioner was false and incorrect. And on somewhat comparable grounds Judge Holtzoff was equally in error in refusing to allow the witness Bush to give testimony, not available at the first trial, concerning prior admissions Artis had made which were in contradiction of Artis' first-trial testimony (pages 16-17, *supra*).

If Artis' first-trial testimony was to be available at all for use by the prosecution at the second trial—and under the unusual circumstances of this case it should not have been (pages 57-59, *infra*)—then the most elementary considerations of fairness and justice required that the defense

be allowed to adduce evidence of Artis' repudiations and contradictions of such testimony. This was vital impeaching evidence which petitioner was entitled to have put before the jury.

B. *Judge Holtzoff's prejudicial error in failing and refusing to inform the jury of the deficiencies and weaknesses he himself had noted in Artis' testimony at the first trial.*

At the first trial Judge Holtzoff had made it clear that he regarded Artis as a highly unsatisfactory witness (pages 17-18, *supra*). When Artis was absent at the second trial, rendering it impossible for the jury to gain any impression of the witness based on demeanor, it became even more important to communicate to the jury what Judge Holtzoff knew about the deficiencies and weaknesses of Artis' testimony. This, however, Judge Holtzoff refused to do, although requested to by defense counsel (page 18, *supra*), and although his instructions to the jury contained many other comments on the evidence (R. 172-179).

In the federal courts the proper extent of a trial judge's comments to the jury on the testimony rests largely within his discretion, but the discretion can sometimes be abused. *Quercia* v. *United States*, 289 U.S. 466. Judge Holtzoff abused it here by failing to meet the minimum responsibility imposed on him by the exceptional circumstances of this case. The effect of allowing Artis' first-trial testimony to be read to the jury without any comparable admonition whatsoever was to work serious prejudice against petitioner. Moreover, the prejudice was further magnified by Judge Holtzoff's instruction telling the jury they might convict petitioner solely on the basis of Artis' testimony uncorroborated (page 23, *supra*), even though at the first trial he had said "I would not send anybody to the peniten-

tiary on the testimony of Artis" (page 17, *supra*). If this same testimony of the absent Artis was to be used at all at the second trial, then it was grossly unfair for the Government to be allowed to use it without the jury being informed of the important limitations which Artis' actual appearance as a witness at the first trial had so plainly developed.

C. *Judge Holtzoff's error in failing to require the prosecution to produce the original of the Artis statement of December 2, 1958.*

Judge Holtzoff's refusal to honor defense counsel's demand for the original of this statement (page 18, *supra*) cannot be justified. Since the original was admittedly in the Government's possession, the Jencks Act (18 U.S.C. §3500) required it to be produced as a statement of the witness Artis, and also (having been written out by FBI agent Darragh) as a report of the witness Darragh. *Clancy* v. *United States*, 365 U.S. 312; *Campbell* v. *United States*, 365 U.S. 85. The Government's failure to produce this original, and Judge Holtzoff's condonation of this failure, manifests a serious disregard of the duties which the Jencks Act imposes on both prosecutors and trial judges. Particularly in a trial where the Artis matter occupied such prominence and was a source of such controversy, where questions even were raised as to Artis' handwriting, and where defense counsel made it clear that one reason for demanding the original was to use it as a basis of further cross-examination of Darragh (pages 14-19, *supra*), the right of the defense to inspect the original of this statement should have been scrupulously safeguarded by the court. The statute is "designed to further the fair and just administration of criminal justice, a goal of which the judiciary is the special guardian." *Campbell* v. *United States*, *supra*, 365 U.S. at 92.

D. *Judge Holtzoff's error in admitting damaging hearsay on the Artis matter.*

As has been shown (page 19, *supra*), a severe prejudice resulted from FBI agent Darragh's hearsay testimony on redirect, received over defense objection, to the effect that Artis immediately after arrest had implicated petitioner as the person to whom Artis gave money received from cashing one of the money orders. This error, moreover, has cumulative consequences when assessed not in isolation but together with other errors committed in connection with the Artis matter.

E. *Judge Holtzoff's error in refusing to exclude entirely the Artis first-trial testimony under the unusual circumstances of this case.*

When the Artis matter is looked at as a whole, it becomes clear that Judge Holtzoff should have sustained defense objections (page 14, *supra*) to the entire Artis first-trial testimony.

The right of confrontation in criminal cases is guaranteed by the Sixth Amendment, and the courts have been "zealous to protect these rights from erosion." *Greene* v. *McElroy*, 360 U.S. 474, 497. In exceptional cases, such as where a witness has died or become legally unavailable, the testimony given by the witness at a prior trial may be introduced in evidence at a subsequent trial, but this is subject to careful safeguards. *Meyers* v. *United States*, 84 App. D.C. 101, 171 F.2d 800 (1948); *Tatum* v. *United States*, 101 App. D.C. 373, 376, 249 F.2d 129, 131 (1957); *Christoffel* v. *United States*, 200 F.2d 734, 741-743, 91 App. D.C. 241, 248-250 (1952), vacated for resentencing, 345 U.S. 947.

In the present case a combination of highly unusual circumstances required that, in the interests of justice, Artis'

first-trial testimony should be entirely excluded. At the first trial Artis had been such an unsatisfactory witness as to lead to highly adverse comments on his testimony from Judge Holtzoff at that time (pages 17-18, *supra*). Subsequent to the first trial Artis apparently had recanted and totally repudiated his testimony implicating petitioner (pages 15-16, *supra*). Artis' unavailability at the second trial was the result of severe illness, both physical ("chronic lymphatic leukemia") and mental ("chronic brain syndrome, paranoid, schizophrenia with mental deterioration") (R. 20), and there was no way of telling how early the mental condition had started or whether it might have been responsible for some of Artis' first-trial testimony implicating petitioner. Under all the circumstances, the interests of fairness and justice required that the defense objections be sustained and that the Artis first-trial testimony should not be used at all.[13] Instead of instructing the jury that

[13] Conceivably the Government may argue (though it has not yet done so) that Artis' testimony went directly to the first two money orders involved in counts 3 through 7, but not to the third money order involved in counts 8, 9 and 10 (see pages 14-15, *supra*, and Appendix B to this brief); and that since petitioner received concurrent sentences on each count (page 24, *supra*), the whole Artis matter can be disregarded on appeal if petitioner's conviction on count 8, 9 or 10 could be otherwise sustained. Compare *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Lawn* v. *United States*, 355 U.S. 339, 359. Among the answers to such an argument would be the following: (A) The Artis matter occupied such great prominence in this trial that if errors occurred on the Artis matter, then a fair assessment of the record as a whole shows that petitioner was so greatly prejudiced in the eyes of the jury that a new trial is required in the interests of justice. Compare *Milanovich* v. *United States*, 365 U.S. 551, 555-556; *Whittaker* v. *United States*, 281 F.2d 631, 632 (D.C. Cir. 1960). (B) All three of the money orders involved in the trial came from a common source (Tr. 43-46, 53), and proof that petitioner was implicated in the cashing of any one of them would tend to lead the jury to believe petitioner was implicated in all three of them, compare *United States* v. *Sahadi*, 292 F.2d 565, 566-567 (2d Cir. 1961); accordingly, errors with respect to the Artis matter clearly

they might convict petitioner on the uncorroborated testimony of Artis alone (page 23, *supra*), Judge Holtzoff should have kept the Artis testimony from ever being placed before them.

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worked to petitioner's prejudice also with respect to the third money order involved in counts 8, 9 and 10, even though Artis was not directly testifying about that particular money order. (C) The principal testimony implicating petitioner in the offenses covered by counts 8, 9 and 10 was the testimony of Quincy McCall (Tr. 102-106, 110-112), which was in conflict with the testimony given concerning this money order by the defense witness Alexander (Tr. 397-398); Alexander also gave testimony (Tr. 375-379) for the defense on the money order involved in counts 5, 6 and 7, in conflict with the Artis testimony offered by the prosecution; and if the jury accepted Artis' testimony in preference to Alexander's, as evidently it did, then the effect of erroneously admitting the Artis testimony was to prejudicially discredit in the jury's eyes all testimony of the defense witness Alexander, including his testimony on counts 8, 9 and 10. (D) Where concurrent indeterminate sentences are imposed under the District of Columbia indeterminate sentence law (D.C. Code, §24-203)—here, 20 months to 5 years on each count, to run concurrently—it is highly probable that the number of offenses on which the defendant stands convicted will have significant and material effects on the length of sentence he will actually serve; hence an appellate adjudication on the remaining counts is of practical importance even though conviction on one count were to be sustained. (E) In any event, future penalties imposed on a defendant, as well as his possibilities for early parole, may well be materially affected by the number of offenses on which he stands convicted; sustaining one count accordingly does not justify refusal to give appellate review on other counts; the doctrine that other counts need not be considered on appeal was developed prior to and independently of cases such as *United States* v. *Morgan*, 346 U.S. 502; *Fiswick* v. *United States*, 329 U.S. 211, 220-223; and *Pollard* v. *United States*, 352 U.S. 354, 358, and should be re-examined and not followed in cases where the considerations found persuasive in the latter group of decisions apply.

V.

The Prosecutor in His Summation, by Inexcusably Vouching for the Veracity of Government Witnesses, Deprived Petitioner of a Fair Trial.

The prosecutor's vouching for Government witnesses (pages 19-22, *supra*) was in this case without justification. It was highly prejudicial, especially in a case which turned on the jury's assessment of the credibility of conflicting witnesses. *Berger* v. *United States*, 295 U.S. 78, 88; *Viereck* v. *United States*, 318 U.S. 236, 248.

The standards applicable in the federal courts to prosecutors' summations have been considered recently in *Greenberg* v. *United States*, 280 F.2d 472 (1960). There the Court of Appeals for the First Circuit held that a conviction was invalidated because the prosecutor had opened his summation by stating that he is a "sort of thirteenth juror" who uses his training to evaluate evidence, and then had closed his summation by stating his opinion that the defendant was guilty. The opinion, by Judge Aldrich, includes the following (280 F.2d at 474-475):

> "Rule 15 of the Canons of Professional Ethics of the American Bar Association reads,
>
> > 'It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.'
>
> Government counsel stated in oral argument before us that this was 'inapposite' because he is an 'advocate.' We are not clear whether he disapproves of the principle, or whether he considers himself outside of it. In either event we disagree. To permit counsel to express his personal belief in the testimony (even if not

phrased so as to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them has the advantage of official backing. The resolution of questions of credibility of testimony is for impartial jurors and judges. The fact that government counsel is, as he says, an advocate is the very reason why he should not impinge upon this quasi-judicial function. We believe the canon to be elemental and fundamental. See also 1 Bishop, New Criminal Procedure §293 (2d ed. 1913); 6 Wigmore, Evidence §1806 (3d ed. 1940).

"It is true that special circumstances, such as a personal attack upon counsel, may occasionally justify a reply. See, e.g., United States v. Socony-Vacuum Oil Co., Inc., 1940, 310 U.S. 150, 240-242, 60 S.Ct. 811, 84 L. Ed. 1129; Gridley v. United States, 6 Cir., 1930, 44 F.2d 716, 739; United States v. Battiato, 7 Cir., 1953, 204 F.2d 717, 719. Too much has sometimes been read into these cases due in part, perhaps, to language in some of the opinions. To the extent that cases may be found that permit counsel to state their personal belief as a matter of course, we do not follow them. We agree with the statement that 'No one who is at all conversant with jury trials can fail to see the possible prejudice * * * .' State v. Gunderson, 1913, 26 N.D. 294, 297, 144 N.W. 659, 660."

In the light of the foregoing criteria, the prosecutor's summation in the present case exceeded permissible bounds and caused serious unfair prejudice to the defendant. No justification for such conduct by the prosecutor can be

drawn from *Lawn* v. *United States*, 355 U.S. 339, 359-360, note 15. Here, unlike *Lawn*, the prosecutor's comments were not provoked by anything defense counsel had said and, moreover, here the prosecutor did clearly insinuate that the prosecutor's statements were based on personal knowledge or on something else beyond the testimony given by the witnesses before the jury. The cumulative effect was to produce serious unfairness of the type proscribed by the *Greenberg* decision.

While no objection to the prosecutor's remarks was made at the time, the error is of a sufficiently fundamental nature when considered alone—and even more especially when considered together with other prejudicial features of the trial—to bring into operation the principle that "plain error" shall be noticed on appeal. Rule 52(b), Federal Rules of Criminal Procedure; compare *Surratt* v. *United States*, 106 App. D.C. 49, 50, 269 F.2d 240, 241 (1959). The unfairness, having a most flagrant and prejudicial character, originated with the prosecution. It occurred at the end of the trial, when all the evidence had been taken and the case was being put before the jury largely on the basis of which witnesses should be believed. And in any event, once the damage had been done, it is hardly possible that effective corrective action could have been taken by the trial judge.

Authority to notice plain errors and defects affecting substantial rights of a defendant "transforms the right of appeal in criminal cases into one of substance, and furnishes an additional affirmative guarantee that conviction and imprisonment can come only after the defendant has been accorded a fair and impartial trial". *Getchell* v. *United States*, 282 F.2d 681, 691 (5th Cir. 1960). Moreover, an indigent appellant is certainly entitled to the same opportunity which would be accorded to a non-indigent

appellant to obtain an appellate determination on the merits as to whether the doctrine of plain error applies in a particular case.

VI.

Corroboration Should Be Required to Support a Conviction Based on the Testimony of an Accomplice.

As already noted (page 23, *supra*) Judge Holtzoff's instructions to the jury left it open to them to convict petitioner solely on the basis of the uncorroborated testimony of the co-defendant Artis.

It is true that such a charge is in accord with several prior decisions of the District of Columbia Court of Appeals—namely, *Egan* v. *United States*, 52 App. D.C. 384, 287 Fed. 958 (1923); *McQuaid* v. *United States*, 91 App. D.C. 229, 198 F.2d 987 (1952); *Bishop* v. *United States*, 100 App. D.C. 88, 243 F.2d 32 (1957)—as well as decisions in the various other circuits.[14] However, the decisions referred to are deserving of the most careful reconsiderations, particularly in the light of recent developments in the law.

The question whether testimony of an accomplice must be supported by some corroboration connecting the defendant with the offense has had a long and complex history in common law jurisdictions. Over a period of several

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[14] *Benedicto Lebron* v. *United States*, 241 F.2d 885, 887 (1st Cir. 1957); *United States* v. *Stromberg*, 268 F.2d 256, 272 (2d Cir. 1959); *United States* v. *Migliorino*, 238 F.2d 7, 10 (3rd Cir. 1956); *Gormley* v. *United States*, 167 F.2d 454, 457-458 (4th Cir. 1948); *Lyles* v. *United States*, 249 F.2d 744 (5th Cir. 1957); *Poliafico* v. *United States*, 237 F.2d 97, 115 (6th Cir. 1956); *United States* v. *Carengella*, 198 F.2d 3, 7 (7th Cir. 1952); *Esters* v. *United States*, 260 F.2d 393, 394 (8th Cir. 1958); *Marcella* v. *United States*, 285 F.2d 322 (9th Cir. 1960); *Johns* v. *United States*, 227 F.2d 374 (10th Cir. 1955).

hundred years the law's development on this subject has been generally in the direction of more rigorous standards; and nearly half the States of the Union have statutes which affirmatively prevent the trial judge from sending a criminal case to the jury on the basis of an accomplice's testimony unless some corroborative evidence connecting the defendant with the crime has been adduced. 7 Wigmore, Evidence §2056; see, e.g., *People* v. *Wallin*, 32 Cal. 2d 803, 808-809; 197 P.2d 734, 737 (1948); *State* v. *McLaughlin*, 250 Minn. 309, 84 N.W.2d 664 (1957); *State* v. *Grig*, 105 N.W.2d 892, 896 (Minn., 1960); *People* v. *Malizia*, 4 N.Y.2d 22, 148 N.E.2d 897 (1958); *Goodwin* v. *State*, 165 Tex.Cr. 375, 307 S.W.2d 264 (1957); *Medley* v. *State*, 338 S.W.2d 474 (Tex.Cr. App. 1960); *Ing* v. *United States*, 278 F.2d 362 (9th Cir. 1960) (for Alaska). The same rule prevails in some other states—including the neighboring State of Maryland—without the aid of statutory command. *Watson* v. *State*, 208 Md. 210, 217, 117 A.2d 549, 552 (1955); *Wright* v. *State*, 219 Md. 643, 650, 150 A.2d 733, 737 (1959); *Forrester* v. *State*, 224 Md. 337, 345, 167 A.2d 878, 882-883 (1961); *Witham* v. *State*, 191 Tenn. 115, 122, 232 S.W.2d 3, 6 (1950). The policy reflected in those jurisdictions where corroboration is required, whether by statute or decision or both, is based on extensive experience as to possible dangers and unreliability of accomplice testimony, and on the need to insist, in the interests of fairness, upon the safeguard of some corroboration connecting the defendant with the offense.

The prior District of Columbia decisions referred to, like a number of decisions in other circuits, have held that in criminal trials in the federal courts corroboration is not required for the testimony of an accomplice. But all such decisions constitute somewhat attenuated extrapolations from two opinions of this Court, *Holmgren* v. *United*

States, 217 U.S. 509, 523-524, and *Caminetti* v. *United States*, 242 U.S. 470, 495. In *Holmgren* the ground of decision was that a requested charge was incorrect because it improperly assumed the witness to be clearly an accomplice; this Court went on to say: "It is undoubtedly the better practice for the courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them". In *Caminetti*, this Court repeated what was said in *Holmgren* and then added: "While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them. 1 Bishop, Crim. Proc. 2d ed. §1081, and cases cited in the note." It should be noted, moreover, that in *Caminetti* the conviction at least was supported by the testimony of two accomplices, rather than of one alone, so that each accomplice's testimony might have been deemed to have provided some corroboration for the other's.

It is fitting that the law on this subject should now be reexamined from the standpoint of "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience". Rule 26, Federal Rules of Criminal Procedure; *Hawkins* v. *United States*, 358 U.S. 74. The problem is an important and recurring one in the trial of criminal cases throughout the federal courts, including the District of Columbia. The prior decisions of the District of Columbia Court of Appeals—which it is urged should now be qualified or overruled or rejected—have carried the non-corroboration doctrine to extreme lengths, and without even the safeguards which must have been contemplated by *Holmgren* and *Caminetti*. Some of those safeguards were preserved in *Freed* v. *United States*, 49 App. D.C. 392, 266 Fed. 1012 (1920), but have been lost sight of in subsequent decisions.

Holmgren and *Caminetti* establish that during the past fifty years this Court's doctrine has been that it is "the better practice" to instruct the jury to require corroboration before the testimony of an accomplice can justify conviction. It is difficult to understand why the District of Columbia Court of Appeals and the courts in other circuits have felt so free to depart from and to ignore such "better practice". Two generations of failure on the part of the lower federal courts to follow what this Court has described as the "better practice" must surely be enough. Nor is it apparent why "better practice" should not equally require an acquittal if the accomplice's testimony is supported by no corroboration whatsoever connecting the defendant with the offense. A reexamination of the matter is called for, and is certainly appropriate under the evolutionary principles embodied in Rule 26 of the Federal Rules of Criminal Procedure.

A number of additional reasons make such reconsideration most suitable. The problem as to accomplice testimony frequently arises in conspiracy cases; and the great expansion in the federal law of conspiracy—"that elastic, sprawling and pervasive offense" (concurring opinion of Mr. Justice Jackson in *Krulewitch* v. *United States*, 336 U.S. 440, 445)—necessitates a thoughtful reassessment of the safeguards which in the light of modern conditions are necessary and desirable to forestall serious miscarriages of justice. Moreover, apart from the special problems arising in conspiracy cases, in recent years this Court has given renewed and enlarged recognition to a requirement of corroboration in various situations, *Weiler* v. *United States*, 323 U.S. 606 (perjury prosecutions); *Opper* v. *United States*, 348 U.S. 84 (extrajudicial admissions of a defendant); *Smith* v. *United States*, 348 U.S. 147, 151-159 (admissions of elements of offense which involves no tangible *corpus delicti*), where the danger of injustice appears

to be no greater, and perhaps is less, than in situations where conviction might otherwise rest solely on the testimony of one accomplice. The District of Columbia Court of Appeals likewise has recently enlarged the scope of the corroboration requirement in situations where required in the interests of justice. *Kelly* v. *United States*, 90 App. D.C. 125, 194 F.2d 150 (1952); *Wilson* v. *United States*, 106 App. D.C. 226, 271 F.2d 492 (1959). Perhaps the present case is a somewhat extreme one, but in view of the nature and deficiencies of the Artis testimony (pages 14-18, *supra*), it is a shocking departure from the standards of fair play and of justice for the jury here to have been instructed that they might convict petitioner on the basis of Artis' testimony alone and uncorroborated. Certainly in this type of case there is strong need for the jury to be instructed that the testimony of an accomplice will not suffice for conviction unless they are satisfied that there is corroboration connecting the defendant with the offense.

It is true that no specific objection was made to the accomplice charge as given by Judge Holtzoff. However, in view of Judge Holtzoff's other rulings and in view of the prior decisions of the District of Columbia Court of Appeals, any such objection would have been totally unavailing and would not have resulted in the slightest modification of the charge. Thus, absence of objection could in no way have lulled the trial judge into allowing error to go uncorrected. It is not to the District Court but to the appellate courts that one must look for appropriate reconsideration of the doctrine at issue. Under the circumstances, and in view of the large public importance of this question, it is singularly fitting that the doctrine be reconsidered on appellate review of this case. And certainly an indigent appellant is entitled to the same opportunity which would be accorded to a non-indigent appellant to

obtain a determination whether prior decisions should be modified or overruled or rejected.

VII.

Judge Holtzoff's Charge Was Totally Defective in Omitting to Define an Essential Element of the Offenses.

As noted, in dealing with counts 7 and 10—the alleged offenses under 18 U.S.C. §2314, involving interstate transportation of a forged security—the charge clearly fails and omits to instruct the jury that, as an essential element of the offense, the Government must also establish knowledge on the defendant's part that the security was falsely made and forged (pages 23-24, *supra*). The subsequent decision of the District of Columbia Court of Appeals in *Barry* v. *United States*, 109 App. D.C. 301, 287 F.2d 340, was surely correct in holding this to be a fatal defect in a charge given under this statute. And the *Barry* holding that the defect is plain error, requiring reversal even though no objection was made at the trial, is equally applicable to petitioner's case. It is a "fundamental right" of a defendant "that he be convicted of crime only on proof of all the elements of the crime charged against him". *Christoffel* v. *United States*, 338 U.S. 84, 90.

Examination of the portions of Judge Holtzoff's charge dealing with the elements of the offenses of forgery, attempting to utter and uttering (D.C. Code, §22-1401), disclose comparable inadequacies and lack of clarity (R. 175-177, 178-179). Judge Holtzoff left it especially unclear whether the "intent to defraud" must be the intention of the defendant, or merely the intention of the various co-defendants; and he concluded this point by charging (R. 179):

> "the fact, if it be the fact, that he [petitioner] was driving the car with the intention of, if it was the

> intention of, bringing the party to a store to which the check was to be presented for cashing, if he knew that was the purpose of the trip, he can be said to be an aider and abettor and a participant in the offense, if you find that to be the fact."

Thus Judge Holtzoff's last word to the jury left it to them to convict petitioner as a participant if he drove the car knowing the co-defendants intended to cash the money order, but totally without regard to whether petitioner himself knew that the money order was forged. On grounds comparable to *Barry*, a charge so inadequate is plain error requiring reversal.

VIII.

Strong Considerations Favor This Court's Deciding the Merits of Petitioner's Appeal Now, Instead of Remanding for an Initial Determination by the Court of Appeals.

As already indicated (page 36, *supra*), precedents can be found in this Court for either method of disposition; accordingly, the issue is what appears to be "just under the circumstances". 28 U.S.C. §2106.

One pertinent circumstance is that petitioner's conviction at this second trial occurred in March, 1960; at the time of filing this brief it is nineteen months later, and petitioner has not yet had the appellate review on the merits to which he clearly was entitled. When convicted, he was already serving a sentence on a prior conviction, and the sentence in the present case was to begin only at the expiration of the prior sentence (R. 183). It is understood that on or about November 2, 1961, his service of the prior sentence will be completed, and thereupon his service of the present sentence will begin. This case now is expected to be argued in this Court at the earliest in

December 1961, by which time petitioner will be serving the present sentence; and being indigent, petitioner will not have available the means of obtaining release on bail pending final adjudication. Particularly in view of the long delay which already has occurred in obtaining appellate review on the merits—a delay which certainly cannot be attributed to petitioner—there is little to commend a course which would involve still further delay in reaching the merits.

Moreover, the nature of the issues strongly suggests the need for a prompt determination on the merits by this Court. The questions arising in connection with the challenge to the indictment turn directly on the scope of this Court's decisions, particularly in *Costello, Lawn* and *Napue* (pages 37-46, *supra*). The issues arising in connection with the Artis testimony revolve, at least in part, around the residual reverberations of this Court's nearly-forgotten decision in *Mattox* (pages 53-55, *supra*). The issue as to whether corroboration should be required for accomplice testimony grows directly out of this Court's decisions in *Holmgren* and *Caminetti* (pages 64-67, *supra*). Accordingly, it seems especially fitting for this Court to resolve these matters by reaching the merits now.

Conclusion

Petitioner has been improperly and unlawfully deprived of the appellate determination he is entitled to obtain on the merits of his appeal. On balance, the pertinent considerations strongly favor this Court's deciding the merits of petitioner's appeal at this time, instead of remanding for an initial determination by the Court of Appeals.

For many reasons which have been set forth—separately and even more decisively in their aggregate impact—petitioner's conviction should be reversed.

In addition, the case should be remanded to the District Court with instructions that the indictment against petitioner shall be dismissed unless the Government shall promptly inform the District Court that the Government has grounds for controverting the allegations contained in the motion to dismiss (and supporting documents) and that the Government wishes to have a hearing thereon, in which event the hearing shall be promptly held and the matter promptly determined. The District Court should be further instructed that if, at any such hearing, it appears that petitioner has been put to a significant disadvantage by virtue of the passage of time or change of circumstances since the District Court's erroneous ruling on petitioner's motion to dismiss the indictment,[15] then the indictment shall be dismissed.

Respectfully submitted,

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October, 1961

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[15] At the oral argument on this motion, petitioner's counsel had Thompkins available to testify if the court wished to call Thompkins as a witness (page 9, *supra*). Subsequently, at this second trial, after Thompkins had been advised by court-appointed counsel (Tr. 50-52), Thompkins refused to testify as a witness for either the Government or the defense and his claim of privilege was sustained (Tr. 77-82, 298-307). For that or some other reason, Thompkins might turn out to be now unavailable as a witness to testify in support of the motion, even though he had been fully available at the time the District Court took its erroneous action on the motion. In such eventuality, petitioner should not be further prejudiced because of the change of circumstances occurring after the District Court made its erroneous ruling.

APPENDIX A

Constitution, Statutory and Rules Provisions Involved

The Constitution, Preamble:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Fifth Amendment, Due Process Clause:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

18 U.S.C. §2314. Transportation of stolen goods, securities, monies, or articles used in counterfeiting:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or
>
> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country. As amended July 9, 1956, c. 519, 70 Stat. 507.

18 U.S.C. §3500. Demands for production of statements and reports of witnesses:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains

matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub. L. 85-269, Sept. 2, 1957, 71 Stat. 595.

28 U.S.C. §1915. Proceedings in forma pauperis:

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States. As amended Oct. 31, 1951, c. 655, § 51(b, c), 65 Stat. 727; Sept. 21, 1959, Pub. L. 86-320, 73 Stat. 590.

28 U.S.C. §2106. Determination:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

District of Columbia Code, §22-1401. Forgery:

Whoever, with intent to defraud or injure another, falsely makes or alters any writing of a public or private nature, which might operate to the prejudice of another, or passes, utters, or publishes, or attempts to pass, utter, or publish as true and genuine, any paper so falsely made or altered, knowing the same to be false or forged, with the intent to defraud or prejudice the right of another, shall be imprisoned for not less than one year nor more than ten years. (Mar. 3, 1901, 31 Stat. 1326, ch. 854, § 843.)

Federal Rules of Criminal Procedure, Rule 52(b). Plain Error:

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

APPENDIX B

Counts 3 Through 10 of the Indictment

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term
Grand Jury Impanelled May 1, 1958,

Sworn in on May 6, 1958

Criminal No.

Grand Jury Nos. 1625-57, 274-58, 1620-57, 397-58

Housebreaking and Larceny
Forgery and Uttering
(22 D.C.C. 1801, 2201, 2202, 1401)
Vio. 18 U.S.C. 2314

THE UNITED STATES OF AMERICA

v.

MARK COPPEDGE, JR.
ALLEN W. ALEXANDER
CLARENCE H. TYLER
CLARENCE THOMPKINS
ADAM H. ARTIS

The Grand Jury charges:

[Counts 1 and 2 omitted in printing]

THIRD COUNT:

On or about December 2, 1957, within the District of Columbia, Mark Coppedge, Jr., Allen W. Alexander, Clarence H. Tyler, Clarence Thompkins and Adam H. Artis, with intent to defraud, falsely made a Nation-Wide Money

Order by inserting the amount, date, the name James Stewart and the address 732 Apex Rd. Roanoke Va. on the face of the said Nation-Wide Money Order. Following is a photostatic copy of said falsely made Nation-Wide Money Order:

[Copy of D-006188 omitted in printing]

FOURTH COUNT:

On or about December 2, 1957, within the District of Columbia, Mark Coppedge, Jr., Allen W. Alexander, Clarence H. Tyler, Clarence Thompkins and Adam H. Artis, with intent to defraud, did attempt to pass and utter to Morris Gevinson, as true and genuine, a falsely made Nation-Wide Money Order, a copy of which is set forth in the third count of this indictment and is incorporated herein by reference, well knowing the aforesaid Nation-Wide Money Order was falsely made.

FIFTH COUNT:

On or about December 2, 1957, within the District of Columbia, Mark Coppedge, Jr., Allen W. Alexander, Clarence H. Tyler, Clarence Thompkins and Adam H. Artis, with intent to defraud, falsely made a Nation-Wide Money Order by inserting the amount, date, the names James Stewart and the address 732 Apex Rd. Roanoke Va. on the face of the said Nation-Wide Money Order. Following is a photostatic copy of said falsely made Nation-Wide Money Order:

[Copy of D-006162 omitted in printing]

SIXTH COUNT:

On or about December 2, 1957, within the District of Columbia, Mark Coppedge, Jr., Allen W. Alexander, Clarence H. Tyler, Clarence Thompkins and Adam H. Artis, with intent to defraud, passed and uttered to Abraham Borak, as true and genuine, a falsely made Nation-Wide Money Order, a copy of which is set forth in the fifth count of this indictment and is incorporated herein by reference,

well knowing the aforesaid Nation-Wide Money Order was falsely made.

SEVENTH COUNT:

On or about December 6, 1957, within the District of Columbia, Mark Coppedge, Jr., Allen W. Alexander, Clarence H. Tyler, Clarence Thompkins and Adam H. Artis, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the District of Columbia to the State of Maryland, a certain falsely made security, that is, a Nation-Wide Money Order, a copy of which is set forth in the fifth count of this indictment and is incorporated herein by reference, well knowing the aforesaid Nation-Wide Money Order was falsely made.

EIGHTH COUNT:

On or about December 3, 1957, within the District of Columbia, Mark Coppedge, Jr., Allen W. Alexander, Clarence H. Tyler and Clarence Thompkins, with intent to defraud, falsely made a Nation-Wide Money Order by inserting the amount, date, the names George Thompkins and James Stewart and the address 732 Apex Rd. Roanoke Va. on the face of the said Nation-Wide Money Order. Following is a photostatic copy of said falsely made Nation-Wide Money Order:

[Copy of D-006160 omitted in printing]

NINTH COUNT:

On or about December 3, 1957, within the District of Columbia, Mark Coppedge, Jr., Allen W. Alexander, Clarence H. Tyler and Clarence Thompkins, with intent to defraud, passed and uttered to Augustus Jackson, as true and genuine, a falsely made Nation-Wide Money Order, a copy of which is set forth in the eighth count of this indictment and is incorporated herein by reference, well knowing the aforesaid Nation-Wide Money Order was falsely made.

TENTH COUNT:

On or about December 10, 1957, within the District of Columbia, Mark Coppedge, Jr., Allen W. Alexander, Clarence H. Tyler and Clarence Thompkins, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the District of Columbia to the State of Maryland, a certain falsely made security, that is, a Nation-Wide Money Order, a copy of which is set forth in the eighth count of this indictment and is incorporated herein by reference, well knowing the aforesaid Nation-Wide Money Order was falsely made.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 157

MARK COPPEDGE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The order of the court of appeals (R. 64) is not reported. The opinion of the district court upon the motion of petitioner to dismiss the indictment appears in the record at R. 28–30.

JURISDICTION

The order of the court of appeals was entered on November 4, 1960 (R. 64). A petition for a writ of certiorari was filed on November 16, 1960, and was granted on June 19, 1961 (R. 184; 366 U.S. 959). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether on application for leave to appeal in forma pauperis despite an adverse certificate by the trial judge the court of appeals, after it has examined legal memoranda submitted by appointed counsel on the basis of the trial transcript, could properly conclude that further proceedings in forma pauperis were not warranted.

2. Whether the court of appeals should on its own motion have concluded that objections to trial instructions to the jury, not challenged in either court, raised a non-frivolous question of plain error.

STATUTE INVOLVED

Section 1915 of Title 28 U.S.C. provides in pertinent part:

> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.
>
> An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.
>
> (b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by

the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

* * * * *

STATEMENT

I. THE PROCEEDINGS UNDER REVIEW

A. THE CONVICTION

Petitioner, Allen W. Alexander, Clarence H. Tyler, Clarence Thompkins, and Adam H. Artis were indicted in a sixteen-count indictment returned in the United States District Court for the District of Columbia (R. 2). Counts 1 and 2 charged unlawful entry into, and theft from, a pharmacy (R. 173). Counts 3 and 4 charged forging and attempting to utter a falsely made money order to Morris Gevinson. Counts 5, 6, and 7 charged forging, uttering, and causing the transportation in interstate commerce of a falsely made money order uttered to Abraham Borak. Counts 8, 9, and 10 charged the same acts in relation to a money order passed to Augustus Jackson (Pet. Br. 78–81; R. 175–179). Counts 11

through 16 alleged similar offenses (R. 2).[1] Thompkins and Artis pleaded guilty (R. 6). After a jury trial, during the course of which Alexander pleaded guilty, Tyler was acquitted and petitioner was convicted under the first ten counts (R. 6). Upon appeal, the conviction was reversed due to prejudicial newspaper publicity resulting from Thompkins' contumacious behavior in refusing to be sworn as a government witness, which his attorney claimed was caused by fear of petitioner, and the failure of the trial judge adequately to determine the effects of the newspaper articles. *Coppedge* v. *United States,* 272 F. 2d 504 (C.A.D.C.). On March 11, 1960, at the second trial, after the jury found petitioner guilty under Counts 3 through 10, concurrent sentences of 20 months to 5 years were imposed on each count (R. 180, 182–183).[2]

B. THE PROCEEDINGS ON APPEAL

On March 22, 1960, the trial judge denied an application for leave to appeal in forma pauperis, certifying the appeal as frivolous and not in good faith. Thereupon, petitioner filed, *pro se,* a petition in the court of appeals for leave to appeal in forma pauperis (R. 1–4). The court appointed counsel in his behalf (R. 5), and on June 15, 1960, his counsel

[1] All defendants were named in each count except Artis who was charged only in counts 3 through 7 (Pet. Br. 78–81). At petitioner's first trial, the court entered a judgment of acquittal upon counts 11 through 16 (R. 168).

[2] The sentence imposed after the first trial was imprisonment from 2 to 6 years. The court reduced the sentence because of the jury acquittal on the first two counts (R. 182–183).

filed a memorandum (R. 5–28) in support of the application, relying upon three contentions as involving "substantial questions". These are set forth in relation to the trial record, *infra*, pp. 15–16.

The government agreed (R. 31) that forma pauperis relief should be granted to the extent of the preparation of a transcript of the proceedings since petitioner had satisfied the requirements of *Whitt* v. *United States*, 259 F. 2d 158 (C.A.D.C.). In response, petitioner argued for immediate granting of the entire forma pauperis application, contending that the substantiality of the issues was evident without a transcript. He stated that the government's position required that the case "be brought before this Court again on the motions calendar, and orally argued before this Court and determined; and that only thereafter, the case should be briefed on the merits and orally argued on the merits and decided by this Court as an appeal." He asserted that this procedure would result in delay and cause a "fragmentation of the appellate disposition of in forma pauperis cases" (R. 33). On July 1, 1960, the court ordered that the transcript be furnished and the forma pauperis application otherwise be held in abeyance (R. 34).

After the transcript was prepared, the government filed a detailed memorandum opposing the forma pauperis application (R. 35–40). In turn, petitioner filed another memorandum based upon the transcript, urging the same "substantial questions" and two "new substantial questions", also set forth *infra*,

p. 16 (R. 40-63). A three-judge panel of the court of appeals (Chief Judge Miller and Judge Bastian, with Judge Bazelon dissenting), after considering the petition and "the memoranda in support and in opposition", denied the petition without opinion (R. 64).

II. THE ISSUES RAISED

A. THE PROCEEDINGS IN THE DISTRICT COURT

1. The evidence showed the following: In the early morning of December 2, 1957, an unlawful entry and theft at the New Fidelity Drug Store resulted in the taking of blank Nation-Wide money orders, a check-writing machine, cigarettes, and over thirteen hundred dollars in cash (R. 173–174).

In December 1957, a trunk owned by petitioner containing the proceeds of the burglary was brought to the home of Quincy and Hattie McCall by Tyler and another individual at the request of petitioner. Several times, within the next few days, petitioner removed items from the trunk (R. 174–175; see also Tr. 100–101, 137–138). In early December 1957, Adam Artis passed one of the stolen money orders (Govt. Ex. 3), completed by forgery, to Abraham Borak at the Gayety Liquor Store in the District of Columbia. Petitioner drove Artis, Alexander, and Tyler to this liquor store in an automobile. Artis had been told, in petitioner's presence, to go into the liquor store and cash the money order by informing the proprietor that it came from his uncle in Roanoke, Virginia. After Artis passed the money order, he gave the pro-

ceeds to petitioner (R. 87–89, 103–106, 177, 179; see also Tr. 267–272). Petitioner and his three companions then went to a grocery store where Artis unsuccessfully attempted to pass a second money order (Govt. Ex. 2) (R. 82–83, 107, 176). On December 3, 1957, Clarence Thompkins passed a third forged money order (Govt. Ex. 5) at a delicatessen, visiting the store with Quincy McCall. On this occasion, petitioner and Alexander were again in the automobile (R. 178–179). The two uttered money orders were transported from the District of Columbia to Maryland, where the issuing bank was located (R. 178).

2. On June 23, 1959, the court of appeals reversed petitioner's conviction following his first trial. *Coppedge* v. *United States*, 272 F. 2d 504 (C.A.D.C.). The opinion disclosed the following:[1] On December 11, 1958, during the course of the trial, after Clarence Thompkins had refused to be sworn as a witness, his lawyer "told the court that the reason Thompkins refused to take the stand was fear. 'I sincerely and honestly believe that Clarence Thompkins is deathly afraid of Mark Coppedge. Mark Coppedge was involved in another incident involving his brother, Charles Thompkins, in which Charles Thompkins was unmercifully beat, his teeth knocked out and he was pistol whipped. Clarence Thompkins saw that happen.'" Clarence Thompkins, in an interview, had

[1] The episode is not part of the record filed in this Court but was part of the joint appendix on the first appeal (Case No. 14,985, C.A.D.C., J.A. 55–57, 60–62, 78–80).

also disclosed to government counsel that his life had been threatened by petitioner. The trial court (Judge Holtzoff) then held Thompkins in contempt. This incident was reported in the newspapers together with a statement that Coppedge was serving a prison term for assault with a deadly weapon on Charles Thompkins.' 272 F. 2d at 505. The appellate court held that the nature of the articles was such that no reasonable juror "could erase from his mind this picture of the defendant, whom they were trying for offenses which did not involve physical violence." 272 F. 2d at 508.

3. Prior to the second trial, on November 17, 1959, the petitioner filed a motion to dismiss the indictment, contending that Clarence Thompkins, who was incarcerated at Lorton Penitentiary, had perjuriously implicated the petitioner in testimony before the grand jury. Attached to the motion were (1) a November 18, 1958, statement purportedly signed by Thompkins, alleging that he gave a false statement against petitioner after being promised that housebreaking charges would be dismissed and charging further that false statements implicating petitioner in this offense were made to the grand jury upon the promise by the Assistant United States Attorney, Thomas A. Flannery, that other offenses would be dismissed against Thompkins if he entered a guilty plea; (2) a letter which Clarence Thompkins had written prior to the

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'The Court recently refused to review a collateral attack on this sentence. *Coppedge* v. *United States*, No. 211 Misc. this Term, certiorari denied, October 9, 1961.

sentencing of petitioner after the first trial, stating that he had made false statements implicating others;[5] and (3) two copies of an unsigned paper which included a charge that Thompkins' purported false statements had been prompted by F.B.I. agent Joseph Woods (R. 8–10).

On December 11, 1959, at the hearing on this motion, defense counsel made a legal argument, conceding that a "bona fide strong showing" was necessary to vitiate the indictment, and indicating that he was resting upon the statements already filed.[6] The Assistant United States Attorney, Thomas A. Flannery, took the position that the motion was insufficient because it did not allege that the indictment was secured solely on Thompkins' testimony, substantiating his statement by furnishing the court a copy of the grand jury testimony (R. 65–72).

On December 22, 1959, the court (Judge McGuire) denied this motion in a memorandum opinion, concluding that petitioner had made an insufficient showing to compel the dismissal of the indictment. It

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[5] The complete letter, which was attached to the motion, does not make it clear whether the false statements relate solely to the housebreaking charge.

[6] His remarks relative to testimony were as follows (R. 66):

"I have made available for the Court this morning, though I do not intend, unless it be necessary, to call upon them for testimony, the defendant, Mr. Coppedge, who is with us here, and also Mr. Clarence Thompkins, who is the affiant and who is the person who we allege implicated Mr. Coppedge improperly.

"I am prone, Your Honor, to rest upon the presentation made in the exhibits already in our jacket in the file."

noted that the court of appeals' opinion shed light on this "eleventh hour renouncement," that the grand jury transcript revealed sufficient competent evidence to support the indictment, and that petitioner's first conviction had not been dependent on Thompkins' testimony (R. 28–30).

When Clarence Thompkins was called as a witness by both the prosecution and the defense at the second trial, he refused to testify on the ground of self-incrimination (R. 162; see also Tr. 77–82, 298–307).

4. On December 24, 1959, petitioner filed a motion to examine the grand jury transcript, which was argued before Judge Holtzoff on January 22, 1960. In the course of defense counsel's explanation of his motion to dismiss, the following ensued (R. 74–75):

> Mr. Cohen [defense counsel]: Very briefly, the motion was based on perjurious implicating testimony, the evidence of the perjurious implicating testimony being letters written to the Court, of which I have purported copies and signed statements to this effect: The perjurer was a person named Clarence Thompkins. Your Honor may remember him from having the trial in your Court—he was the gentleman who refused, I believe, to even take the stand in the matter.
>
> The Court: I remember the episode very well. He was just terrorized by Coppedge.
>
> Mr. Cohen: If your Honor please, I am not alleging this; I am stating that this Thompkins, on signed statements, he asserts that he perjured himself.
>
> The Court: He asserts—I imagine that statement was induced by Coppedge. In any event,

> you cannot try cases twice or in bits. If the testimony was perjured, the jury will so find. We cannot first determine whether the Government's testimony is perjured and then try the case.

The court thereupon denied the motion (R. 75).

On March 1, 1960, after a jury was impaneled and sworn to try the case before Judge Holtzoff, the court denied defense counsel's oral request "whether or not your Honor might consider withdrawing from the case" (R. 77–78). A second request, made after the opening statements, which called the court's attention to the pretrial motion, was also denied (R. 78).

5. At the second trial, the court permitted the introduction into evidence of the first trial testimony of Adam Artis, after the jury was informed that he was unavailable as a witness due to advanced leukemia and to a mental condition (schizophrenia, paranoid type) which had developed (R. 97). The court overruled petitioner's objections based on an undated "writing" signed by Artis alleging that his prior testimony "was just not so", and the claim that, since Artis was not now subject to cross-examination, his testimony should not be received.[7] The court found

[7] The writing in part was as follows (R. 22):

"I, Adam H. Artis, after having several drinks whiskey and wine with a fellow whom I recall as Quincy, at his apartment, did leave with him (Quincy) to several places in which I was given by him (Quincy) money orders to cash. I cash one and received funds from him (Quincy) for doing so, and as I can remember I attempted to cash several more without any success. I don't quite recall where these places were that I cashed and

that the "writing" did not affect the admissibility of the trial testimony and that there was cross-examination at the first trial (R. 90–92). Assuming that the statement might be handwritten by Artis, the court, on its own motion, stated it was inclined to allow petitioner to offer it into evidence "if it is genuine" (R. 92–93). When defense counsel stated that he would like to introduce the writing, the court, upon examining the writing, retracted this ruling, commenting that it had presupposed the statement to be in one handwriting, and noting that the statement was undated and unsworn and that it did not know any circumstances concerning its preparation. The court finally ruled that counsel could have "it marked for identification" but that the writing would not be admitted "in view of the fact that it is not in his handwriting" (R. 95–97). Petitioner did not have the statement marked and did not further move to introduce it into evidence.

The defense was permitted to impeach Artis by statements made to petitioner's first trial defense counsel (R. 134–139). The court refused, however, to permit Robert L. Bush to testify to a purported conversation between Artis and petitioner in February

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attempted to cash the money orders, all of this taken place in the month of December 1957, within the District of Columbia.

"I had no connections with any of the other defendants in this case concerning the money orders from December till now and know not of what concern they are to this case.

"I, Adam Artis do solemnly swear that the foregoing statement is true to the best of my knowledge and is made for the benefit of clearing my conscience and for justice for I have just suffered a stroke."

1958, concerning the crimes involved, on the ground that any statements by petitioner would be self-serving declarations and that defense counsel, at the first trial, could have confronted Artis with such statements when he testified at that trial on December 11, 1958 (R. 142–144, 100). No offer of proof was made as to the nature of the statements although one of the questions was "whether Mr. Coppedge had anything to do with it?"

The prior testimony of Artis disclosed the following: In early December 1957, Artis became a passenger in an automobile whose other occupants were petitioner, Tyler, and Alexander. Alexander told him, in the presence of the others, that he had a check which could be cashed if Artis followed instructions. Petitioner drove the car to a liquor store where Artis cashed the check in purchasing some liquor, giving the money received to petitioner (R. 102–106). Subsequently, after Alexander completed a second money order with Artis' name, petitioner drove them to a grocery store from which Artis and Alexander fled when the proprietor telephoned to determine the validity of the money order (R. 106–107). Artis was "pretty well intoxicated" on that day (R. 113, 117, 121).

6. At the first trial, Artis had been cross-examined on the basis of a statement given to an F.B.I. agent which had been reduced to writing by the agent and had been read to Artis before his signature was affixed (R. 117–120, 26; Defendant's Exhibit 4 at the first trial). At the second trial, after the government had rested, the prosecutor, at petitioner's request, prom-

ised to obtain for the defense at least a copy of Artis' statement (from North Carolina) (R. 132). The next trial day, Monday, March 7, 1960, the prosecutor informed the court that its arrival was expected shortly (R. 133). The defense called petitioner's retained attorney at the first trial who testified that he understood from interviewing Artis that the F.B.I. agent was supposed to have made promises to Artis (R. 137).

In rebuttal, the agent testified that, in interviewing Artis on December 2, 1958, he had not promised Artis anything and that he had written in longhand the statement which Artis had signed (R. 147–149). On cross-examination, after the agent testified that he had been informed that the original long-hand statement was en route, he was cross-examined on the basis of an "exact copy" but not a carbon copy of Artis' statement. The court refused to delay the trial to await arrival of the original (R. 149–150, 154–155). Petitioner's counsel brought out that Artis had related that he entered the liquor store alone to cash the check and had returned to "Steve, Mark and Allen" in the automobile (R. 151). On redirect, the prosecutor showed that Artis had then also disclosed that "Mark" had received the change resulting from the uttering of the money order (R. 153).

7. In the course of its instructions, after the court charged the jury as to the credibility of witnesses, it told the jury that government witness Artis and defense witness Alexander were accomplices on the basis of their testimony, that the testimony of an accomplice must be scrutinized "with care and caution" but that

the law permitted a conviction on the uncorroborated testimony of an accomplice (R. 170–171). In summarizing the evidence and explaining the nature of the charge, the court said, in regard to the evidentiary dispute as to whether Coppedge or Alexander received the money, that this issue "is not too important." The jury was told that if it found petitioner was in the car and participated in causing the money orders to be presented and that if it found petitioner drove the automobile for the purpose of bringing the person to a store for the purpose of cashing the checks "if he knew that was the purpose of the trip, he can be said to be an aider and abettor and a participant in the offense" (R. 179).

There were no exceptions to the court's charge (R. 180).

B. THE ISSUES RAISED IN THE COURT OF APPEALS

In appellate counsel's first request for leave to appeal in forma pauperis and for a transcript, he raised three issues which he characterized as substantial: (1) the indictment was invalid because Thompkins' grand jury testimony was perjured (R. 8–17); (2) the trial judge erred in summarily refusing to disqualify himself (R. 17–19);[8] (3) petitioner

[8] Counsel stated: "It is certainly exceptionally difficult for counsel newly appointed on appeal to assess this point without having available the written transcript of what Judge Holtzoff said on January 22, 1960, the written transcript of what occurred when the motions to disqualify were made, and indeed the written transcript of the remainder of the trial which would disclose whether any manifestations of prejudice on the part of the judge are reflected elsewhere in the written record * * *" (R. 18).

was prejudiced in connection with the use of the prior record testimony of co-defendant Artis who was unavailable at the second trial (R. 19–27).

After the transcript had been furnished to counsel and the government had opposed the motion for leave to proceed further in forma pauperis, counsel raised two new issues: (1) a request that the court reexamine its rule that a jury may convict a defendant upon the uncorroborated testimony of an accomplice (R. 54–58) and (2) an objection to the government's closing argument to which no exception had been made at the trial (R. 58–62). The challenged instruction and argument were set out in haec verba.

After his petition for certiorari and the brief in opposition were filed, petitioner, in a reply brief, raised in this Court a new issue which had not been presented to the court of appeals. Relying on *Barry* v. *United States*, 287 F. 2d 340 (C.A. D.C.), decided after the certiorari petition was filed, he contended that the instructions were deficient with regard to the element of knowledge of the falsity of the money orders, and that this alleged error should have been noted by the court below on its own motion.

SUMMARY OF ARGUMENT

I

A. Petitioner was accorded, in the court of appeals, the rights granted by 28 U.S.C. 1915, as interpreted by this Court. The trial court certified that petitioner's appeal was frivolous. In order to determine whether to set aside this certificate, the court of ap-

peals appointed counsel for petitioner and furnished him with a trial transcript. After examining the detailed memoranda submitted by appointed counsel and the government, and with the record available, a three-judge panel of the court concluded that no further briefing and argument were required.

The procedure adopted by the court of appeals was reasonable, and in accord with the mandate of this Court and with the Congressional purpose in enacting 28 U.S.C. 1915. The denial of further leave to proceed in forma pauperis was surrounded by the protections to which this Court has held an indigent entitled. The only element usually present in ordinary appellate proceedings which was absent was oral argument, and it is primarily for each court in its discretion to decide which of its cases merits oral argument. While the court did not write an opinion, the sound administration of appellate review also leaves this to the discretion of each court.

B. The determination of frivolity was made after competent counsel had been afforded an opportunity to present the issues in the light of the stenographic transcript. The court did not make its appraisal that further briefing and argument was unnecessary at a stage when such a conclusion could not be fairly made. Where a district court has denied leave to appeal in forma pauperis on direct appeal from a conviction, the question of frivolity often comes before the court of appeals at two points. At the first stage, after appointing counsel, the court of appeals must decide if there is sufficient indication that a question

meriting review will be raised to justify a request for the grant of a transcript. At that point it is reasonable to require that the request be granted unless the frivolousness of the issue is apparent from the face of the application. However, once counsel has been appointed, a transcript obtained, and the issues briefed, the question is whether the issues have been sufficiently clarified by the initial briefs to warrant summary determination without further argument on the merits. At this stage, the court of appeals is justified in denying further argument when in its opinion the issues presented have been sufficiently elucidated so that further review would unnecessarily consume the court's time.

C. This procedure employed by the court below does not constitute an invidious discrimination against indigent defendants. Petitioner has received as full review on the matters presented in counsel's memoranda as that to which a non-indigent would be entitled. The review was similar to the procedure which would have been utilized if the government had filed a motion for summary disposition. In following the dictates of Congress, as expressed in 28 U.S.C. 1915, the courts of appeals have discretion in the procedure adopted to uphold or set aside a frivolity certificate of the trial judge, provided that every litigant is given adequate opportunity to present his contentions and these contentions are given fair consideration by the appellate tribunal. The method employed should be left to the procedure suggested by the experience and volume of work in each circuit.

A procedure for disposing of appeals summarily is appropriate whenever the court is made aware of the frivolous nature of the appeal. That this situation arises more frequently in this class of indigent appeals than in non-indigent appeals stems from the fact that, in non-indigent cases, there is seldom the preliminary briefing and analysis necessary in indigent cases (of the present type) under 28 U.S.C. 1915. The non-indigent cases (as well as indigent appeals in which the trial court grants leave to proceed in forma pauperis) do not normally reach the appellate judges for consideration, as a court, until the stage of oral argument. The standing mechanism for disposing without oral argument of indigent cases of petitioner's type, where that is appropriate, does not represent any denial of equal justice. Rather, appellate courts should be free to expand and develop similar procedures for culling all cases which do not merit oral argument.

II

The issues raised by petitioner did not warrant further briefing and argument.

(1) The mere presentation of an unverified statement of a co-defendant that he had perjured himself before the grand jury does not warrant the dismissal of an indictment, particularly since the judge found that there was ample other evidence to support the indictment. That the government had evidence other than the testimony of the witness is shown by the fact that the challenged witness did not testify at the first trial, and there was no contention that any of the witnesses who did testify committed perjury.

(2) The oral motion to disqualify the presiding judge after the jury had been sworn was properly denied. The court's remarks merely recalled the contumacious incident involving co-defendant Thompkins at petitioner's first trial. In any event, a judicial opinion acquired from matters presented in the course of judicial proceedings affords no ground for disqualification.

(3) The trial court properly admitted into evidence the record testimony of Artis at the first trial and its rulings in connection with this prior testimony were correct:

(*a*) A purported contradictory statement of Artis was properly excluded in the absence of any showing that it was made subsequent to his testimony at the first trial, and in the absence of any effort to present such a foundation. Moreover, it is not clear that petitioner ultimately decided to introduce the writing into evidence.

(*b*) Since the court made substantially similar comments in its instructions in respect to Artis' testimony at both trials, there was no prejudice in failing to repeat verbatim its remarks at the first trial.

(*c*) The trial court did not have to delay the trial to await the arrival of an original statement made by Artis to an F.B.I. agent, produced at the first trial, where an exact but not a carbon copy had been furnished, and the F.B.I. agent was cross-examined on the basis of this copy. Petitioner's counsel could have demanded its production prior to the commencement of the second trial. The trial judge, in view

of these circumstances, acted within his discretion in not delaying the trial to await the arrival of the original statement.

(*d*) The defense, having put part of Artis' F.B.I. statement in evidence, is in no position to complain that the government introduced other portions.

(*e*) The combination of all these objections did not make Artis' first trial testimony inadmissible. Insofar as Artis' mental condition is concerned, petitioner did not contend, in accordance with the recognized standard applicable to the competency of witnesses, that Artis was unable to comprehend the obligation of an oath at the time of his first trial.

(4) A reading of the prosecutor's closing argument shows that he did not express his personal belief in the testimony. His summation made it clear that his remarks were based on the evidence in the case.

(5) The request to reexamine the settled rule on instructions as to accomplice testimony did not raise a non-frivolous issue. Since this case did not rest on the uncorroborated testimony of an accomplice and since no exceptions were made to the court's charge, such a reexamination was particularly inappropriate here.

III

Petitioner presents in this Court a new issue which was not presented to the court of appeals and was raised for the first time in his reply to the government's brief opposing certiorari. Subsequent to the filing of the petition for a writ of certiorari, in

Barry v. *United States*, 287 F. 2d 340 (C.A. D.C.), a prosecution for causing the interstate transportation of a forged check, the court below found plain error in the trial court's charge concerning the knowledge requisite where a defendant is charged with personally presenting a forged check and the evidence of knowledge of the falsity of the check was not strong. Relying on *Barry*, petitioner contends that the court of appeals should have noted plain error on its own motion in this case. Here, however, there was no claim that petitioner personally forged or uttered the stolen money orders; his complicity depended on evidence that he may have directed the cashing and that he drove the "cashers" to the place where the documents were presented. The trial judge, recognizing this, instructed the jury that petitioner could be convicted as an aider and abettor only if he knew the purpose of the trip. Thus, the jury was specifically told that to convict they must find that petitioner had knowledge of the forgery.

ARGUMENT

I

THE DENIAL OF LEAVE TO PROCEED IN FORMA PAUPERIS MET THE REQUIREMENTS OF 28 U.S.C. 1915

The trial court, pursuant to the terms of 28 U.S.C. 1915, *supra*, pp. 2–3, certified that petitioner's appeal was frivolous and not taken in good faith. Petitioner's application to the court of appeals for leave to appeal in forma pauperis thus faced, under the statute, the initial barrier of that order, and the

initial requirement of showing that the order was improper. The court of appeals, after appointing an attorney to represent petitioner, granting him a transcript at government expense, and examining extensive legal arguments made by counsel, decided that further proceedings in forma pauperis were not warranted. In effect, it found, after examining the matter in detail, that there was no reason to set aside the trial judge's certificate. The procedure it adopted to reach that conclusion, as well as the conclusion itself, represent, we think, a reasonable method for carrying out the general principles with respect to forma pauperis appeals set forth by Congress in 28 U.S.C. 1915.

That statute embodies two concepts. On the one hand, an indigent defendant is entitled to an adequate appellate review of his conviction—a right, at government expense, to present for review to an appellate court any issue not plainly frivolous. On the other hand, Congress has sought to prevent the courts from being burdened with frivolous appeals and has given district court judges the initial duty of sifting out frivolous appeals. Faced with the certificate of the trial judge that the appeal is frivolous, the Court of Appeals for the District of Columbia Circuit has adopted a procedure, followed in this case, which does secure adequate consideration to the contentions of an indigent, but does not disregard the Congressional intent that weight be given to the determination of the district judge. On the basis of the development of the issues before it, the court of appeals

could properly conclude that no further proceedings in forma pauperis were required.

A. PETITIONER HAS BEEN ACCORDED AN ADEQUATE APPELLATE REVIEW

(1) *Petitioner had the benefit of counsel, the trial record, and detailed written memoranda*

On petitioner's *pro se* motion in the court of appeals to proceed in forma pauperis despite the certificate of the trial judge, the court of appeals promptly furnished him the assistance of a competent and conscientious attorney (R. 5). Counsel prepared a detailed memorandum in support of the application for leave to prosecute an appeal in forma pauperis (R. 5–28), after examining the record in the first appeal and the documents on file, and discussing the case with trial counsel and petitioner (R. 7). The government conceded that under *Whitt* v. *United States*, 259 F. 2d 158 (C.A. D.C.), the appeal could be adequately evaluated only on the basis of a transcript (R. 31), and the court granted petitioner a transcript at government expense (R. 34). Upon receipt of the transcript, the government filed a memorandum opposing an appeal in forma pauperis (R. 35–40), and the petitioner filed another detailed memorandum (R. 40–63). Petitioner's counsel argued at length five questions which he denominated substantial.

Thus, as required by this Court, petitioner had the benefit of representation by counsel who, in the role of an advocate, with the assistance of the transcript, argued those matters which he believed warranted

the granting of leave to appeal without prepayment of costs. See *Ellis* v. *United States*, 356 U.S. 674; *Johnson* v. *United States*, 352 U.S. 565; *Johnson* v. *Zerbst*, 304 U.S. 458.

(2) *A three-judge panel of the court of appeals considered petitioner's contentions*

The court which passed upon petitioner's case was a three-judge panel of the court of appeals. That court had before it ample materials to determine whether further consideration of the case was warranted. Counsel called the attention of the court to five matters which counsel thought might merit reversal of the conviction: (1) the validity of the indictment (R. 8–17, 41–44); (2) the refusal of Judge Holtzoff to disqualify himself (R. 17–19, 44–50); (3) the alleged prejudice resulting from the prior trial testimony of Adam Artis[9] (R. 19–27, 50–54); (4) a request for reexamination of the rule that a defendant may be convicted upon uncorroborated accomplice testimony (R. 54–58); and (5) the claim that government counsel improperly vouched for the veracity of government witnesses in closing argument (R. 58–62).

The transcript and other materials, such as petitioner's memoranda and the government's opposition, enabled the court to evaluate fully the claims advanced by petitioner.[10] Counsel utilized the tran-

[9] Petitioner in the court of appeals did not claim that Artis' testimony affected each count of this concurrent sentence case.

[10] We are informed that even though, in the absence of the docketing of an appeal, the trial record is not formally before the court of appeals, in fact the entire jacket from the district court is sent to the court of appeals when a petition for leave to proceed in forma pauperis is filed in that court.

script, as well as his conversations with trial counsel and his study of the court files, to provide petitioner with a scrupulous examination of any possible error which might entitle him to a reversal of the conviction. Generally, counsel either reproduced verbatim the incident upon which he claimed error in his memoranda or argued that an examination of the transcript was not necessary. As to the indictment, he claimed that without a transcript immediate reversal was justified. He quoted the court's instructions upon accomplice testimony and the prosecutor's argument claimed to be error (R. 54, 58–61). He also quoted the writing of Artis which he would have permitted into evidence (R. 22) and the redirect examination of F.B.I. agent Darragh to which he objected R. 52–53). The issues involved in his other contentions were made manifest by his memoranda. Thus, the court had ample basis to evaluate petitioner's contentions. The denial of leave to proceed further in forma pauperis, based upon these materials, was surrounded by all the protections to which this Court has held an indigent entitled under 28 U.S.C. 1915. See *Farley* v. *United States,* 354 U.S. 521; *Johnson* v. *United States,* 352 U.S. 565; cf. *Edwards* v. *United States,* 355 U.S. 36.

(3) *Neither oral argument nor an opinion was required*

Essentially the only element usually present in ordinary appellate proceedings which was absent here was oral argument. Such an omission does not de-

prive petitioner of any constitutional right."[11] *Price* v. *Johnston*, 334 U.S. 266; *Federal Communications Commission* v. *WJR, the Goodwill Station*, 337 U.S. 265. While the importance of oral argument has been recognized by both courts and advocates, its absence does not mean that a litigant had an inadequate review. The importance of argument varies from court to court. We believe that it is primarily for each court in its discretion to decide which of its cases on the docket merit oral argument.

The court also did not write an opinion, a statement of the reasons on which its judgment rests. See *Rogers* v. *Hill*, 289 U.S. 582, 587. But the sound administration of appellate review again leaves this to the discretion of the court. As Mr. Justice Stephen Field said in *Houston* v. *Williams*, 13 Cal. 24, 26:

> * * * It is not every case, however, which will justify the expenditure of time necessary to write an opinion. Many cases involve no new principles, and are appealed only for delay. It can serve no purpose of public good to repeat elementary principles of law which have never been questioned for centuries. The Court must therefore exercise its own discretion as to the necessity of giving an opinion upon pronouncing judgment, and if one is given, whether it shall be orally or in writing * * *.

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[11] Rule 19 of the Rules of the United States Court of Appeals for the District of Columbia Circuit provides that oral argument may be waived if counsel chooses and now also provides that the court may terminate oral argument if the court feels such argument is not necessary. Rule 31(a) of the court's Rules provides that there will be no oral argument on motions.

See also Rudin, *The Requirement of Written Opinions*, 18 Calif. L. Rev. 426 (1930).

B. THE COURT OF APPEALS WAS NOT REQUIRED TO CONSIDER THE APPEAL FURTHER ONCE IT WAS SATISFIED THAT THE ISSUES RAISED DID NOT REQUIRE FURTHER BRIEFING AND ORAL ARGUMENT

The determination of whether a case is frivolous or merits further argument may be difficult. Adroit counsel may make the trivial appear substantial and it is the function of the court to pierce this veil. In such an appraisal, courts will differ in the same manner as they do where the qualitative judgment is based upon a standard such as substantial or prejudicial error. The important factor is that the defendant have adequate opportunity to present his case, not whether in a particular instance the court's evaluation of the exact strength of the case is precisely accurate.

It is one thing to appraise a case as frivolous or unworthy of further consideration, when there has been no real opportunity to present the issues. A conclusion reached under such circumstances is arbitrary action. It is quite a different matter to reach that conclusion after the case has been well briefed by competent counsel who has had the benefit of a stenographic transcript.

Where a district court has denied leave to appeal in forma pauperis on direct appeal from a conviction, the question of frivolity often comes before the court of appeals at two points. At the first stage, after appointing counsel, the court of appeals must decide whether there is sufficient indication that a question

meriting review will be raised to justify furnishing a transcript. At that point, where the decision must to a large extent be made on the basis of potentialities, it is reasonable to construe the term "frivolous" liberally in favor of the defendant and to grant the request unless the issues be "plainly frivolous" or clearly apparent from the face of the application. Otherwise, such an appellant would not be afforded a reasonable opportunity to appeal and his right to review would be a vain one. That is the teaching of this Court's decision in *Johnson* v. *United States*, 352 U.S. 565; *Farley* v. *United States*, 354 U.S. 521; and *Ellis* v. *United States*, 356 U.S. 674.

However, once counsel has been appointed, a transcript obtained, and the issues briefed (even though preliminarily), the court of appeals is confronted with a very different situation. In actuality, the question then is—whatever terminology one employs—whether there is need for still further briefing and for oral argument, or whether the matter can be disposed of at once. It is very similar to the question which confronts this Court when, having determined that certiorari should be granted or an appeal allowed, it decides whether the issue has been sufficiently clarified by the initial briefs to warrant summary determination without further argument on the merits. See, *e.g.*, *Kreshik* v. *St. Nicholas Cathedral*, 363 U.S. 190; *Sims Motor Transportation Lines, Inc.* v. *United States*, 362 U.S. 637; *Wabash Railroad Co.* v. *Commercial Transport, Inc.*, 361 U.S. 1; *Beard* v. *Ohio*, 361 U.S. 4; *Womack* v. *Ohio*, 361 U.S. 5; *Smith*

v. *United States*, 361 U.S. 13; *Harris* v. *Pennsylvania Rd. Co.*, 361 U.S. 15; *United States* v. *Haley*, 358 U.S. 644; *United States* v. *Lane Motor Company*, 344 U.S. 630.[12] At this stage, the court of appeals, like this Court, is justified in denying further argument when in its opinion the issues presented have been sufficiently elucidated so that further review would unnecessarily consume the court's time. Where, as here, there has been extensive briefing which reveals the insubstantiality of the claims of error (after forewarning that the appeal may be dismissed), there is no reason to require additional consideration by the court through formally docketing the appeal, receiving further briefs, and hearing oral argument.

As we show below (*infra*, pp. 37–53), we believe that, on the questions enunciated in the memoranda of petitioner's counsel in the light of the record, a non-indigent's appeal would have been subject to dismissal or summary affirmance (see, *e.g.*, *United States* v. *Johnson*, 327 U.S. 106; *Brown* v. *United States*, 293 F. 2d 149 (C.A. D.C.); *Sykes* v. *United States*, 224 F. 2d 313 (C.A. 4); *United States* v. *Esters*, 161 F. Supp. 203 (W.D. Ark.); cf. *Porter* v. *United States*, 272 F. 2d 695 (C.A. 5)). Petitioner has received as full a review on the matters presented in his counsel's

[12] Rule 16(1)(c) of this Court's Rules provides that the court "will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

memorandum as a non-indigent would be entitled to under the same circumstances. His poverty has not prevented appellate determination of this case on an adequate record and after adequate presentation. *Eskridge* v. *Washington State Board of Prison Terms and Pardons*, 357 U.S. 214, 216; *Griffin* v. *Illinois*, 351 U.S. 12; *Burns* v. *Ohio*, 360 U.S. 252; *Smith* v. *Bennett*, 365 U.S. 708.

C. THE PROCEDURE EMPLOYED BY THE COURT BELOW DOES NOT CONSTITUTE AN INVIDIOUS DISCRIMINATION AGAINST INDIGENT DEFENDANTS

1. There is no substantial distinction between the procedure employed in this case and the procedure which would have been followed if government counsel had filed a motion to affirm or dismiss on the ground of frivolity.[12] If, after giving both sides an opportunity to state their position, the court had dismissed such an appeal, the case would stand in the same posture. If a court has a right to dismiss an appeal summarily or to affirm summarily, and has discretion to grant or deny oral argument on appeal, the issue in this case narrows down to the question whether the forma pauperis procedure in the court below invidiously deprives an indigent of the right to oral argument simply because it is an outgrowth of the determination that the court of appeals is required to make under 28 U.S.C. 1915, and no comparable determination is necessary in paid appeals.

[12] Rule 39(a), F. R. Crim. P., provides that the "appellate court may at any time entertain a motion to dismiss the appeal * * *," and courts of appeals likewise entertain, on occasion, motions for summary affirmance.

The historic concern for the rights of indigents in the courts of law, in both civil and criminal matters, has been to insure that the fact of indigency does not deprive the party of his full measure of justice. This principle has rightly moved Congress and this Court to provide the protections we have discussed. But it has also been a matter of concern that those remedies which mitigate the rigors of poverty should not also open the floodgates to frivolous and unsubstantial proceedings. The danger is obviously greater where the appellant does not pay the cost. The Congress, in allowing appeals, included the express provision that such appeals would not be granted if in bad faith or frivolous. See 45 Cong. Rec. 1532–1534, 1767 (1910); see also *Wells v. United States,* 318 U.S. 257.[14]

In following the dictates of Congress, as expressed in 28 U.S.C. 1915, the courts of appeals have discretion in the procedure used to uphold or set aside a certificate of the trial judge that an appeal is frivolous. Various alternatives are possible. The court may combine the forma pauperis determination with the case on the merits, or it may deem it more expeditious to separate the two proceedings. It may grant one or more oral arguments, or deny oral argument. It may write an opinion on the forma pauperis motion as well as in the case on the merits, or it may dispose of a case summarily. See *e.g. Brown* v. *United*

[14] See Jacoby, *Legal Aid to the Poor*, 53 Harv. L. Rev. 940 (1940); Comment, *Appellate Review for Indigent Criminal Defendants in the Federal Courts*, 26 U. Chi. L. Rev. 454 (1959); Ridge, *The Indigent Defendant, a Procedural Dilemma for the Courts*, 24 F.R.D. 241.

States, 277 F. 2d 204 (C.A. 8); *Page* v. *United States*, 272 F. 2d 816 (C.A. 8); *Tweedy* v. *United States*, 276 F. 2d 649 (C.A. 9). The method adopted should be left to the procedure suggested by the experience and volume of work in each circuit, provided that every indigent is given adequate opportunity to present his contentions and these contentions are given fair consideration by the appellate tribunal. Unless the screening process provided by Congress is to be limited solely to those questions which, from their mere statement, are seen as devoid of all merit as a matter of law or of immediately apparent fact, a court of appeals which has had issues presented to it preliminarily—on the record and with briefs of counsel—may properly decline to permit further proceedings in forma pauperis when it decides that further briefing and argument are unnecessary. This procedure should be equally applicable whether the court is made aware of the essentially frivolous nature of the appeal on a bail application, or on a motion of the appellee to affirm the judgment, or on a forma pauperis application by the appellant. [15]

[15] The various circuits have, on occasion, dismissed appeals or summarily affirmed the decision below when the insubstantiality of the appellant's claims became apparent on the court's consideration of a bail application, an application for stay of deportation pending appeal, a motion by the government to dismiss or affirm, a motion in connection with settling the record on appeal, etc. For such a reported case in the District of Columbia Circuit, see *Boomhower, Inc.* v. *American Automobile Insurance Co.*, 220 F. 2d 488, certiorari denied, 350 U.S. 833; for a recent case in which that court dismissed an appeal as frivolous on a motion for appointment of counsel, see *Lyles* v. *United States*, No. 633 Misc., this Term.

Section 1915 of Title 28 does not require a choice between giving the appellant all at the outset (the full procedure normally available on paid appeals) or nothing at all (no counsel, no transcript, no briefing). The appellate court can properly draw the line somewhere in between, at the point that appears appropriate in the particular case. For instance, although it might not be apparent, in the absence of the transcript, that there was sufficient evidence to sustain the verdict or that the trial judge gave a proper charge on some contested issue, the record of the trial (coupled with counsel's presentation of his points) might well make it manifest that the defendant had no case. In such an event, we do not believe that the appellate court would be compelled to set the case down for argument, receive and consider further briefs, and delay appellate disposition for no substantial end. Similarly, if the opposing positions on some issue of law are sufficiently set forth so that the court feels ready and able to reject the defendant's contention without further argument, there is no need and no point to permitting further proceedings. In all cases, the significant question is whether the appellate court has had the opportunity to evaluate the defendant's case on the basis of all the materials it properly needs. Once it has obtained all those materials and has determined that nothing further is necessary to help it decide, it is not required to let the defendant proceed further.

2. Petitioner accuses the court below of making invidious distinctions between this class of indigent

appeals and non-indigent appeals, because few non-indigent appeals are dismissed or summarily affirmed without oral argument.[16] First, this overlooks the lack of any practical distinction between affirming or dismissing an appeal and denying leave to proceed in forma pauperis after full elucidation of the issues. See, *e.g.*, *United States* v. *Pravato*, 282 F. 2d 587, 591 (C.A. 2); *Johnson* v. *United States*, 265 F. 2d 496 (C.A. 4). *Gilpin* v. *United States*, 252 F. 2d 685, 265 F. 2d 203, 266 F. 2d 352 (C.A. 6); *Smith* v. *United States*, 293 F. 2d 532 (C.A.D.C.); *Lancaster* v. *United States*, 293 F. 2d 519 (C.A.D.C.); *Lee* v. *United States*, 289 F. 2d 766 (C.A.D.C.). Second, petitioner overlooks the cardinal fact that in non-indigent appeals (as well as in indigent appeals in which the trial court grants leave to proceed) there is seldom preliminary briefing and analysis, as is necessary in this class of indigent cases in which the appellate court must decide whether to allow the defendant to proceed in forma pauperis. In the other groups of cases, the matter is not normally called to the judges' attention until after all the briefs on the merits have been filed and distributed;[17] even then,

[16] It should be emphasized that many forma pauperis appeals (those in which the district court grants leave to appeal) proceed in ordinary course. The problem of this case involves only those indigent appeals which the district court has found frivolous and in which the defendant then applies to the court of appeals. And even in that class the court of appeals often grants leave to proceed at the outset.

[17] Unlike this Court, the courts of appeals, whose jurisdiction is almost wholly obligatory, do not ordinarily have to decide whether to take or hear a case, and accordingly do not have the

no formal action by the court is necessary until after argument, and there is no routine procedure by which the court decides for itself whether oral argument is unnecessary. Accordingly, once the briefs are submitted, it is usually as expeditious to proceed to the oral argument. See *Young* v. *United States*, 267 F. 2d 692, 693 (C.A.D.C.). But the review actually granted the appellant in such a case is, in reality, no greater.

It is true that the government has not often moved to dismiss non-indigent appeals or for summary affirmance—because it is usually easier and just as quick to proceed in normal course, rather than to file an unusual motion to dismiss—but the fact that the government fails to take such appropriate action does not mean that an indigent is prejudiced when appropriate action is taken as to him. As this Court said in another context, a problem may be dealt with "* * * where it is seen, without providing for others which are not so evident or so urgent." *Hirabayashi* v. *United States*, 320 U.S. 81, 100. This is especially so in the District of Columbia, where the courts must deal, as in the States, with the prosecution of the ordinary local types of crimes and where the workload of the court of appeals is increased by the filing of approximately one forma pauperis application per working day of each term. See *Surratt* v. *United States*, 262 F. 2d 691 (C.A.D.C.), dissent

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equivalent of this Court's conferences at which certiorari is granted or denied, probable jurisdiction noted, or the decision below affirmed summarily.

by Prettyman, C.J.; *Young* v. *United States*, 267 F. 2d 692 (C.A.D.C.); *Jones* v. *United States*, 266 F. 2d 924, 926 (C.A.D.C.). In this class of forma pauperis cases—indigent appeals disallowed by the trial court—there exists perforce a standing mechanism, under the statute, for culling the particular cases which should be stopped short of oral argument. Its continued and careful use does not represent any denial of equal justice, just because no similar standing mechanism exists for non-indigent cases or for indigents granted leave to appeal in forma pauperis by the trial court.

Petitioner here has had adequate review of his contentions. Despite the efforts of counsel to develop an issue of merit, the fact is that, as we show below (pp. 37–53), when examined in the light of the transcript and other materials, the issues raised are properly characterized as frivolous and unworthy of further argument. Leave to appeal in forma pauperis was therefore properly denied.

II

THE ISSUES RAISED BY PETITIONER WERE PROPERLY DETERMINED TO BE FRIVOLOUS, AFTER BRIEFING, AND DID NOT WARRANT FURTHER BRIEFING AND ARGUMENT

(1) THE FILING OF AN UNVERIFIED STATEMENT OF A CO-DEFENDANT THAT HE HAD PERJURED HIMSELF BEFORE THE GRAND JURY DOES NOT WARRANT THE DISMISSAL OF THE INDICTMENT

a. Petitioner's motion to dismiss the indictment, filed before his second trial, alleged that his co-defendant Clarence Thompkins (who had refused to be

sworn as a witness at his first trial and who refused to testify at his second trial) perjuriously implicated the petitioner in testimony before the grand jury. Petitioner supported his motion with an unverified statement and letter signed by Thompkins to that effect, and by two unsigned papers. Petitioner did not contend that only Thompkins testified before the grand jury and he did not contend that the witnesses who testified at the first trial committed perjury. In denying the motion, the district court found *inter alia* that an examination of the grand jury transcript revealed sufficient competent evidence to support the indictment (R. 29). In our view, the contention that the mere unsworn statements of Thompkins that he gave false testimony before the grand jury invalidated the indictment is frivolous in the light of the established law in this field.

Under *Costello* v. *United States*, 350 U.S. 359, *Lawn* v. *United States*, 355 U.S. 339, 349–350, and *Holt* v. *United States*, 218 U.S. 245, the district court properly held that the indictment called for trial of the charge on the merits. These cases show that, at least where there is some other evidence before the grand jury, a claim that a witness lied to the grand jury cannot lead to dismissal of the indictment. See also *United States* v. *Aviles*, 274 F. 2d 179, 190–191 (C.A. 2), certiorari denied *sub nom. Evola* v. *United States*, 362 U.S. 974, where the principal government witness admitted under oath at the trial that some of his grand jury testimony was false, and *Way* v. *United States*, 285 F. 2d 253 (C.A. 10), where a wit-

ness testified that he gave perjured evidence before the grand jury.

Petitioner's position would fetter the investigatory power of grand jurors by subjecting them to the constant threat that their work could be nullified (or at least reappraised) as a result of a change in a witness' story. Any indictment could be subject to invalidation upon the recantation of a single witness. The grand jury would be faced with the dilemma that the more witnesses it heard in a particular investigation of wrongdoing, the greater likelihood that a resulting indictment might be vitiated.

b. The accusation that the Assistant United States Attorney who tried the case and the F.B.I. agent who investigated it did (Pet. Br. 45) "knowingly and wilfully induce a witness to give false and perjured testimony before a grand jury" was never seriously urged. Petitioner's motion filed by his attorney below did not make that charge. This accusation was made in two unsigned statements attached to his motion. And, at neither of the two hearings which related to this motion (R. 65–75), did petitioner's counsel adopt this loose accusation by claiming, in the presence of the Assistant United States Attorney, that he or the F.B.I. agent suborned perjury. In these circumstances, it is plain that no hearing on that issue was appropriate or necessary.

(2) THE ORAL MOTION TO DISQUALIFY THE PRESIDING JUDGE WAS PROPERLY DENIED

As set forth in the Statement, *supra*, pp. 10–11, in the course of the motion to dismiss the indictment, peti-

tioner's counsel stated that the judge "may remember" Thompkins from the previous trial. The judge stated that he remembered the episode; that Thompkins was terrorized by petitioner. He also said he "imagine[d]" that Thompkins' statement as to his perjury before the grand jury was induced by petitioner. On the basis of these remarks, petitioner's counsel, after the jury had been sworn, orally suggested that the trial judge disqualify himself.

Admittedly, the motion does not meet the requirements of 28 U.S.C. 144 since there was no affidavit of personal bias accompanied by a certificate of counsel. Beyond that, however, the remarks do not show the kind of bias which would have required disqualification if an affidavit had been filed. The statute was not intended to disqualify judges solely on the basis of an opinion acquired from matters presented in the course of judicial proceedings before them. If that were so, no judge would be qualified to hear two trials of the same case. *Craven* v. *United States*, 22 F. 2d 605 (C.A. 1), certiorari denied, 276 U.S. 627; *Ferrari* v. *United States*, 169 F. 2d 353 (C.A. 9); *Walker* v. *United States*, 116 F. 2d 458, 462 (C.A. 9); *Eisler* v. *United States*, 170 F. 2d 273 (C.A. D.C.); see also *United States* v. *Twin City Power Co. of Ga.*, 253 F. 2d 197, 204 (C.A. 5); *Barnes* v. *United States*, 241 F. 2d 252 (C.A. 9).

In this case, as indicated by the prior proceedings at petitioner's first trial as well as by the opinion of the court of appeals in reversing that conviction, there were the best of reasons for the judge to make

the inferences that he did. See *supra*, pp. 7–8. The fact that the judge expressed his opinion in response to counsel's invitation, outside of the jury's presence, does not transform a permissible inference into a manifestation of improper bias.

(3) THE TRIAL COURT'S TREATMENT OF THE PRIOR TESTIMONY OF ARTIS WAS PROPER

At petitioner's second trial, on the basis of proof that Artis was then physically and mentally incompetent to testify, the testimony of Artis at the first trial was read into evidence. *Supra*, pp. 11–14. By making a number of contentions, petitioner attempts to develop an issue out of this fact. However, his contentions, when examined, are all found to be wholly insubstantial and therefore frivolous.

(a) *A purported contradictory statement of Artis was properly excluded in the absence of any showing that it was made subsequent to his testimony at the first trial or that it was made by Artis*

Petitioner complains that an undated purported recantation by Artis was erroneously excluded as evidence. A statement of the facts indicates the fallacy of this argument.

At the second trial, when petitioner's counsel objected to the introduction of Artis' prior trial testimony on the ground that he had found a recantation by Artis, he made two statements concerning the writing. He first asserted that, at the time Artis testified at the first trial, the statement was not "in existence, was not available to defense counsel." He

then qualified this remark by saying that he did not have such knowledge, stating that he had found it in the case file received either from petitioner's former trial or from appellate counsel. The court's position was that this did not affect the admissibility of the record testimony at the first trial but that, if the writing was a statement of Artis, it would be allowed in evidence(R. 91–92).

Petitioner claimed the writing was admissible into evidence simply because it bore the signature of Artis. When the court examined the writing and saw that it was not in the handwriting of Artis, was undated and unverified, he announced that he was not going to admit such a statement under such circumstances (R. 95–96). The writing itself stated that it was made just after Artis had suffered a stroke (R. 22).

The simple answer to the question of the admissibility of the writing denominated by petitioner as a subsequent recantation is that no real effort was made to show that it was composed *subsequent* to the prior trial testimony, or indeed that it was a statement of Artis. On December 11, 1958, Artis had testified at petitioner's first trial (R. 100). But previously, on July 19, 1958, Artis had been admitted into a hospital after a cerebral vascular accident, a stroke (R. 141). Since the statement, on its face, refers to a stroke, it is reasonable to conclude that it was drafted shortly after Artis' cerebral vascular accident in July 1958, well before his first trial testimony.

In addition, the record is not clear as to whether petitioner decided ultimately to attempt to introduce the Artis writing into evidence. The issue as to the admissibility arose in the course of the government's case. At the conclusion of the argument on the point, the court stated in regard to the writing: "At the proper time, if you wish, Mr. Cohen [defense counsel], you can have it marked for identification, but I am not going to admit it, in view of the fact that it is not in his handwriting" (R. 97). Petitioner did not have the writing marked or attempt to introduce it as part of his case. The writing denied that Artis had "connections" with any of the defendants concerning the money order (R. 22). *Supra*, pp. 11–12, fn. 7. Defense testimony was to the contrary (R. 159–160). In view of this contradictory testimony, defense counsel may have concluded, as a part of his trial strategy, not to introduce Artis' writing. He may have felt that the government at this stage would have acquiesced and that showing the writing to the jury would have been detrimental to petitioner.

(b) *Since the court made substantially similar comments in respect to Artis' testimony at both trials, there was no prejudice in not repeating verbatim his remarks at the first trial*

Petitioner complains that the trial judge at the first trial gave certain instructions to the jury indicating weakness in Artis' testimony, but that such precautions were not taken at the second trial, despite petitioner's oral request that the judge repeat his comments (R. 144–145).

At the first trial, the court had instructed the jury that Artis was "somewhat confused on the witness stand", and specifically charged he was "uncertain as to whether he gave the money to Coppedge or Alexander because he seemed to waver back and forth" (R. 25).[13] The gist of these remarks was

[13] The complete statement shown by the record at the first trial was as follows: "Now, some of the testimony in this case was given by Artis, who was a co-defendant but whose case you do not have to determine. Artis is an accomplice. I am required by law to state to you that the testimony of an accomplice should be received with care and scrutinized with caution. However, after doing so, it is for you to determine whether to believe or not to believe the accomplice, and you have a right to believe him if you feel that he is telling the truth, after you have scrutinized his testimony with caution and received it with care.

"In fact, the law permits a conviction of a crime on the uncorroborated testimony of an accomplice, if the jury decides to believe the accomplice. Here, however, the government is not relying solely on the testimony of the accomplice.

"And, I might add that Artis was somewhat confused on the witness stand and you have a right to consider that in determining the weight to attach to his testimony. Now, the fifth, sixth and seventh counts of the indictment relate to another money order, which was passed, according to the government's testimony, at a store maintained by the witness Borak, a liquor store. The fifth count charges forgery of the money order, the sixth count charges that it was uttered, that is, passed to Abraham Borak, who cashed this money order. The testimony on that issue was given first by Borak, who identified Artis as the man who passed the check to him and Artis, as stated heretofore, testified that he was in a car driven by Coppedge, that Alexander was in the car and Alexander gave the check to Artis while Coppedge stopped the car to give Artis an opportunity to go into the liquor store and that afterwards, when he cashed the check, he gave the money to Coppedge. However, he was a little uncertain as to whether he gave the money to Coppedge or Alexander because he

that Artis was uncertain as to whom he gave the money, and that the jury had a right to consider that confusion in determining the weight of Artis' testimony. The charge thus minimized the effect of Artis' evidence as to the receipt of the money.

At the second trial, the court stated, in the course of summarizing the evidence and explaining the nature of the crimes charged, in regard to the Artis testimony concerning the recipient of the money obtained by Artis in cashing the money orders, that this issue "is not too important." The jury was told that if it found petitioner drove the automobile for the purpose of bringing the person to a store for the purpose of cashing the checks "if he knew that was the purpose of the trip, he can be said to be an aider and abettor and a participant in the offense" (R. 179). There were no exceptions to this charge (R. 180). Though in different words and form, this instruction minimized this aspect of Artis' testimony to the same effect as the charge at the first trial."

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seemed to waver back and forth." (Case No. 14,935, C.A.D.C., J.A. 121–122).

The court below could properly take judicial notice of the record in that court of petitioner's first trial. *United States* v. *Pink*, 315 U.S. 203, 216.

[19] Petitioner also objects to statements of the court about Artis which were made at the first trial outside the presence of the jury. But this argument is also based on the erroneous premise that the instructions concerning Artis were substantially different at the two trials.

(c) *The trial court did not have to delay the trial to await the arrival of an original statement which had been produced at the first trial since a copy was furnished*

Petitioner complains of the failure to furnish him with the original, rather than a copy, of a statement given by Artis to F.B.I. Agent Darragh. The issue is simply whether the trial court had discretion not to delay the end of the trial for the arrival of the original statement from North Carolina when the original had been seen by petitioner's first trial counsel, present in court as a defense witness on the last day of trial, and the defense was given a copy of the statement.

At the first trial, Artis had been cross-examined on the basis of the original statement which he gave to the agent (R. 117–120, 26; Defendant's Exhibit 4 at the first trial). After the government rested at the second trial, government counsel promised to obtain at least a copy of this statement and petitioner did not then absolutely demand the original (R. 132). On the next and last trial day, government counsel advised the court that he expected the original statement to arrive shortly (R. 133). On that same day, petitioner's first trial attorney appeared in court as a defense witness (R. 134).

Petitioner cross-examined the last witness, F.B.I. Agent Darragh, on the basis of a copy of the statement (R. 149–153). He desired the original for further cross-examination but the court refused to delay the termination of the case to await the arrival of the original (R. 153–155). The testimony of the agent was to the effect that the copy was an exact, but not a carbon, copy. Prior to the second trial, petitioner's

counsel had a right to inspect this statement because of its status as an exhibit at the first trial and could have had it produced prior to the second trial. In view of these circumstances, the trial judge acted within his discretion in not delaying the trial to await the arrival of the original statement.

(d) *The defense, having put part of a statement into evidence, is in no position to complain that the government introduced other portions*

Petitioner further complains of evidence by F.B.I. Agent Darragh, concerning a statement to him by Artis that Artis gave the money to "Mark" (R. 153). On direct examination, the government merely elicited the fact that a statement had been given by Artis to Agent Darragh (R. 147–149). The defense cross-examined Darragh as to part of its contents, showing that Artis entered the liquor store as instructed, made a purchase, received the change from "the one hundred dollars" and returned to "Steve, Mark and Allen in the automobile" (R. 151). It was only after the defense had thus opened the door with respect to part of the contents of the statement that the questions complained of were asked on redirect examination.

(e) *The testimony of Artis was properly admitted into evidence*

Petitioner binds together all his objections to Artis' testimony with the conjecture that Artis' later mental condition (Pet. Br. 58) "might have been responsible" for Artis' original testimony, and upon that unproven assumption argues that Artis testimony at the first trial

should not have been admitted at all in the second trial.

Prior to the admission of the recorded testimony, the jury at the second trial was informed of petitioner's mental condition at the time of that trial (R. 97). Petitioner did not contend that Artis was unable to comprehend the obligation of an oath, the test applicable where a witness is sought to be disqualified because of supposed mental condition. *District of Columbia* v. *Armes*, 107 U.S. 519, 521–524; *Schneider* v. *Kelm*, 237 F. 2d 721, 727 (C.A. 8); *Shibley* v. *United States*, 237 F. 2d 327, 334 (C.A. 9). The jury was entitled to be apprised of the earlier testimony and it was for the jury to weigh its credibility.

(4) THE PROSECUTOR'S CLOSING ARGUMENT SHOWS THAT HE DID NOT EXPRESS HIS PERSONAL BELIEF IN THE TESTIMONY

Petitioner, who did not object at the trial, contends that the prosecutor, in his summation to the jury, vouched for the veracity of government witnesses (R. 155–166). An examination of the excerpts now complained of (R. 157, 160, 162–163) which, with one exception, were extensively urged upon the court of appeals below (R. 58–62), discloses a discussion by government counsel of the credibility of various witnesses indicating their consistency, lack of motivation, and demeanor while testifying. Throughout his argument government counsel made it clear that his summation was based on the testimony and evidence in the case. The government attorney did not hold himself out as a "thirteenth juror" or indicate that he had personal knowledge. From the context it is ap-

parent his words represented advocacy on the basis of the evidence, and not testimony based on personal knowledge. There was thus no error. *Lawn* v. *United States*, 355 U.S. 339, 359–360, note 15; *Thompson* v. *United States*, 272 F. 2d 919 (C.A. 5), certiorari denied, 362 U.S. 940; *Schmidt* v. *United States*, 237 F. 2d 342 (C.A. 8). That the court below was not at all impressed with this claim of error does not show that it did not review petitioner's case with an awareness of the "plain error" doctrine.

(5) THE REQUEST TO REEXAMINE THE ESTABLISHED RULE ON ACCOMPLICE TESTIMONY WAS WITHOUT ANY MERIT ON THE FACTS OF THIS CASE

Petitioner, conceding that the instruction to the jury that the testimony of accomplices need not be corroborated was in accord with the decisions of this Court and the settled rule of the District of Columbia, contends that the court below should have reexamined its rule. In the face of the established law, this contention could clearly be regarded by the court below as frivolous. If reexamination of an established principle would as a matter of course remove a case from the category of frivolous, no appeal could ever be so denominated. There is no reason why this case should call for reexamination of the settled rule. First, no request for a different instruction was made at the trial. Second, petitioner's case is not a fitting one for such reexamination. As he himself concedes, the conviction did not wholly rest upon the testimony of accomplice Artis (Pet. Brief, pp. 58–59, note 13), and it is highly unlikely

that the jury based its verdict solely on Artis' evidence even as to the incidents as to which he did testify. If this principle should be reexamined, a proper case would be a conviction which rested solely upon the uncorroborated testimony of an accomplice, and where the issue was called to the attention of the trial court.

These were the issues presented to the court of appeals. When three of them were first raised in the application by petitioner's counsel, the court properly felt that it could not make a determination without the record. However, with the record before it, as well as further briefs, the court properly reached the conclusion that no further briefing and argument were necessary to demonstrate that petitioner had absolutely no case. The best efforts of able counsel cannot inflate these contentions into issues which are other than basically frivolous.

III

THE NEW ISSUE WHICH PETITIONER NOW SEEKS TO INJECT DOES NOT JUSTIFY LEAVE TO PROCEED FURTHER ON APPEAL IN FORMA PAUPERIS

After the petition for a writ of certiorari had been filed, petitioner, in his reply to the government's brief in opposition in this Court, suggested that there was another issue in the case which merited leave to appeal in forma pauperis. His contention was based on *Barry* v. *United States*, 287 F. 2d 340 (C.A.D.C.), decided by the court below after denial of leave to appeal in forma pauperis in this case.

In the *Barry* case, the court of appeals reversed a conviction for unlawfully transporting in interstate commerce a falsely made check, finding that the trial judge failed to charge that knowledge was an element of the offense and holding that such failure was plain error. Petitioner alleges that there is a similar error in the present charge, and that, although there was no objection at the trial or suggestion of error by competent and conscientious appellate counsel who had obviously combed the record for error, the court of appeals should on its own motion have noticed this alleged error.

We think the *Barry* decision does not inject into this case a non-frivolous issue which counsel failed to note. This case is very different from *Barry*. In *Barry*, the defendant was charged with himself presenting the forged check. The court of appeals said of the evidence in that case (287 F. 2d at 342):

> The evidence of knowledge that the check was falsely made and forged was not strong. It was almost entirely circumstantial and not easily pieced together. While sufficient to create an issue for the jury, we think its lack of clarity enhanced the importance of awareness by the jury that knowledge at the time of transportation must be established beyond a reasonable doubt. Failure to guide the jury in this respect may well have caused them to omit consideration of this branch of the case.

In this case, however, there was no claim that petitioner himself either forged the check or uttered it; his guilt depended on his complicity in the forging and the uttering. Recognizing this, the judge,

before he went into detail as to the elements of the offense, gave a rather full explanation of the aiding and abetting principle, saying (R. 172):

> There is another important rule of law that is applicable to this case and that you must bear in mind: If several persons act jointly, each performing a part that results in the commission of an offense, then each of them is equally guilty of the offense, as though he performed and committed the entire offense himself. For example, if a person drives an automobile to the place where the offense is committed in order to enable the commission of the offense, and he knows the purpose for which he is driving the car, he is guilty of the offense to the same extent as the person who actually committed the offense.
>
> Knowledge, of course, cannot be proven directly, because there is no way of delving into the recesses of the mind of another person. Knowledge may be inferred by the jury from circumstances, from things done, things said, and sometimes from the act itself.
>
> Another rule of law connected with this is that any person who aids or abets, as the law says, another person committing the offense, is as guilty of the offense as though he had himself committed it.

Again, after going over the evidence, the court said as to two of the three checks involved (R. 179):

> There is some dispute in the evidence as to whether, when the two checks here were cashed, whether the proceeds were handed to the defendant Coppedge, or were handed to the defendant, Alexander. Whether it is one

> or the other is not too important. If you find that Coppedge was in the car and participated in forging the money orders and in causing them to be presented for cashing, of course, the mere fact that Coppedge was there, standing alone, is not sufficient to convict him; but the fact, if it be the fact, that he was driving the car with the intention of, if it was the intention of, bringing the party to a store to which the check was to be presented for cashing, *if he knew that was the purpose of the trip,* he can be said to be an aider and abettor and a participant in the offense, if you find that to be the fact. [Emphasis added.]

There was thus no possibility that the jury could have convicted petitioner without finding that he knew that the checks were forged. Failure of trial counsel to object to the instructions and the failure of petitioner's present counsel to raise the point previously were quite justified. There was no plain error in the instructions in this respect—there was no error at all.

CONCLUSION

For the reasons stated, it is respectfully submitted that the order of the court of appeals should be affirmed.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 157

MARK COPPEDGE, JR.,

Petitioner,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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Court of Appeals)

December 1961

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REPLY BRIEF FOR PETITIONER

The Government's brief continues the strenuous and almost inexplicable efforts the Government has been making for about a year and a half to prevent this petitioner from obtaining a full appellate review on the merits of petitioner's direct appeal from a federal criminal conviction.

But now the Government has jettisoned completely many of the contentions it advanced, respectively, in its opposition filed in the Court of Appeals (R. 35-40) and in its brief in opposition previously filed in this Court. The Government's brief espouses a new group of contentions which the Government now claims would show that petitioner's appeal, in each and all of its aspects, is "plainly frivolous". While the Government's new contentions—however belatedly advanced—are even less persuasive than their prede-

cessors, they do serve to underscore the reasons why petitioner is entitled not merely to receive a full appellate determination on the merits, but also to prevail when the merits are adjudicated.

I.

As to In Forma Pauperis Procedure.

Everything the Government says (pages 22-37) in its labored effort to condone and sustain the procedure which was followed by the Court of Appeals is admittedly irrelevant to this case if—contrary to what the Government is urging—petitioner's appeal raises one or more questions not "plainly frivolous". Since the nonfrivolous nature of petitioner's questions appears so abundantly, perhaps it is unnecessary to say more on this aspect of the case.

Yet, a few additional comments may help to put the matter in perspective.

Nowhere does the Government's brief discuss or refer to or even cite the recent case of *Lurk* v. *United States*, 366 U.S. 712, where the Court of Appeals had followed a procedure substantially identical to the procedure the Court of Appeals followed in this case. In *Lurk* the Government made a comparable effort to condone and sustain the adequacy of the procedure. This Court's disposition of *Lurk* constituted a total rejection of the Government's contentions concerning the adequacy of the procedure.

Nowhere does the Government's brief furnish anything to controvert the facts set forth in petitioner's brief (pages 31-36) which show the gross discrimination being practiced against this petitioner and other indigent appellants in the Court of Appeals for the District of Columbia Circuit.

Full appellate consideration of the merits of a direct appeal in a criminal case cannot be granted to the rich and denied to the poor. The right to designate a record on appeal and have it transmitted to the Court of Appeals (which was denied to petitioner)—so as to be sure that an appeal record is properly compiled and is placed before the appellate judges in a complete, intelligible and orderly fashion—is a right which cannot be granted to the rich and denied to the poor. The right to file a brief on the merits in the Court of Appeals (which was denied to petitioner) is a right which cannot be granted to the rich and denied to the poor. The right to argue orally in the Court of Appeals (which was denied to petitioner) is a right which cannot be granted to the rich and denied to the poor. The right to have a full appellate adjudication on the merits (which was denied to petitioner) is a right which cannot be granted to the rich and denied to the poor.

These are matters making the vital difference between equal justice and unequal justice. They are not merely matters of semantics or terminology. Indeed, the Government's brief in this case illustrates how easy it is, even for able public servants, to fall into the habit of characterizing an indigent's contentions as "plainly frivolous" when the Government happens to disagree with them. Surely the teachings of *Ellis* v. *United States*, 356 U.S. 674, are still a long way from being accepted and applied either by the Government or by the Court of Appeals for the District of Columbia Circuit.

II.

As to the Attack on the Indictment.

The Government's brief (page 38) says that three decisions by this Court—namely, *Costello* v. *United States*, 350 U.S. 359, *Lawn* v. *United States*, 355 U.S. 339, 349-350, and *Holt* v. *United States*, 218 U.S. 245—"show that, at least where there is some other evidence before the grand jury, a claim that a witness lied to the grand jury cannot lead to dismissal of the indictment".

In the first place, it has not been established here that there was "some other evidence before the grand jury" implicating petitioner. It is true that Judge McGuire, who made an *in camera* inspection of the grand jury proceedings, thought that there was (R. 28-30). The grand jury transcript, however, was erroneously withheld from defense counsel (petitioner's brief, pages 41-42); it has never been transmitted to nor examined by the Court of Appeals (petitioner's brief, pages 42-43); and in this posture of the case the very minimum requirement for appellate review would be for the Court of Appeals to examine the grand jury transcript *in camera* to determine whether Judge McGuire was right or wrong.[1] Until this has been done by an appellate court, it could not properly be assumed by any appellate court that—as the Government claims—there was

[1] In the Court of Appeals the Government's opposition, referring to petitioner's contention that the Court of Appeals should inspect the grand jury minutes to pass upon the correctness of Judge McGuire's ruling, claimed "No such examination is warranted under *Costello* v. *United States*, *supra*" (R. 37). The Government's brief in this Court neither reasserts this erroneous claim nor makes any answer whatever to petitioner's contention; instead, as has been indicated, the Government builds its principal position on an assumption—as yet unverified by appellate scrutiny—that there was some other evidence before the grand jury to implicate petitioner.

"some other evidence before the grand jury" implicating petitioner.

But in any event, not a single one of these three decisions cited by the Government involved in any way the question we have here—the effect of perjured testimony given by a witness before the grand jury. *Costello*, as has been shown (petitioner's brief, pages 37-38) involved hearsay evidence used before the grand jury. *Lawn* involved some vague "unsupported suspicions", 355 U.S. at 350, that the grand jury had made use of some materials which the defendants had produced at an earlier grand jury proceeding where they had not been warned of their privilege against self-incrimination. *Holt* involved testimony before the grand jury that an accused had made certain admissions obtained under circumstances making them incompetent at the trial; Mr. Justice Holmes' opinion for the Court carefully states, 218 U.S. at 247-248:

> "Without considering how far, if at all, the court is warranted in inquiring into the nature of the evidence on which a grand jury has acted, and how far, in case of such an inquiry, the discretion of the trial court is subject to review, *United States* v. *Rosenburgh*, 7 Wall. 580, it is enough to say that there is no reason for reviewing it here. All that the affidavit disclosed was that evidence in its nature competent, but made incompetent by circumstances, had been considered along with the rest."

Thus, none of these cases dealt with perjured testimony brought before the grand jury; *a fortiori*, none of them dealt with perjured testimony which was either the sole or a most substantial basis for the action taken by the grand jury in indicting the particular defendant; and *a fortiori*, none of them dealt with a situation where the claim of such

perjury was made manifest by a documented motion duly submitted before the trial began.

The Government's brief (page 39) claims that petitioner's position "would fetter the investigatory power of grand jurors" because "any indictment could be subject to invalidation upon the recantation of a single witness". As appears from petitioner's brief (pages 38-41), this is not petitioner's position. A recantation by a single witness would not affect the indictment unless the witness had testified to something that was a substantial and material matter; and then it would first be incumbent upon the trial court, when the question was duly raised before it, to satisfy itself as to the truthfulness of the recantation and also to determine whether, in the light of the entire grand jury proceeding, it can be known with reasonable certainty that the grand jury would have indicted the particular defendant anyway. It is only after such inquiries have been made that the trial court would reach the question whether or not the indictment ought to be dismissed.

Far from frustrating the operation of the grand jury system, this will strengthen and protect it.

The Government's brief (page 39) adopts a different approach in seeking to avoid the force of petitioner's contention (petitioner's brief, pages 43-46) that in any event the District Court, before determining that the indictment should be upheld, should have made a factual inquiry into whether Government agents were responsible for inducing false and perjured testimony by Thompkins for presentation to the grand jury. The Government's brief does not intimate the slightest disagreement with petitioner's legal arguments—namely, that an indictment is subject to attack on such a ground, and that where such a claim is properly advanced a hearing must be held to determine what the

facts are. Instead, the Government's brief (page 39) now claims that this contention "was never seriously urged" in the trial court. But in the supporting documents accompanying the motion to dismiss the indictment, the allegation clearly was sufficiently articulated to require a hearing (see summarization of record in petitioner's brief, pages 7-9). Moreover, when the motion was argued before Judge McGuire on December 11, 1959, Judge McGuire acknowledged that as he understood the gist of the motion, "it is to the effect that a witness who appeared before the Grand Jury was promised if he went before the Grand Jury and testified falsely against the defendant in this case, he, himself, would not be prosecuted" (R. 69). The colloquy then continued (R. 69):

> "Judge McGuire: Is that it?
>
> "Mr. Cohen [defense counsel]: Well, if not be prosecuted, he would be—certain considerations, yes.
>
> "Judge McGuire: Well, or given certain considerations. . . ."

Since the point stood out as clearly as this to Judge McGuire at the time the motion was submitted and argued, it is especially anomalous to find the Government now making a claim—two years and two courts later—that this very point "was never seriously urged".

III.

As to the Use of Artis' First-Trial Testimony.

(A) The Government's brief (page 43) makes a half-hearted suggestion that perhaps, after all, petitioner's trial counsel did not really want to introduce into evidence the Artis recantation statement. The record refutes the suggestion.

What happened was that when the prosecutor stated his intention to introduce Artis' first-trial testimony (R. 90), a colloquy ensued which occupies about nine pages of the transcript (R. 90-95). During the course of this colloquy defense counsel urged, as one of the reasons why the Artis first-trial testimony should not be admitted, that defense counsel had a writing, signed by Artis which was not in existence at the time of the first trial, stating that Artis' first-trial testimony was not true (R. 91-92). Defense counsel immediately acceded to Judge Holtzoff's initial suggestion that the document be turned over to the FBI for comparison with known specimens of Artis' handwriting, and also informed the court that he (defense counsel) had compared it with the one or two money orders in evidence in the case bearing Artis' signature and it appeared genuine (R. 92). After this and further colloquy Judge Holtzoff announced that he would admit the first-trial testimony of Artis (R. 94). After a further unsuccessful effort to persuade Judge Holtzoff that Artis' first-trial testimony should be excluded (R. 94), defense counsel repeated his objection and then stated "if his testimony should be found admissible by Your Honor that I would like introduced in evidence the statement which we have from Mr. Artis that we discussed" (R. 95). Defense counsel then handed the recantation statement to Judge Holtzoff, who after some further discussion said "I will not admit

that" (R. 95). Defense counsel sought to persuade Judge Holtzoff that if the genuineness of Artis' signature was established the document should be admitted (R. 95). Judge Holtzoff said even if it was Artis' signature (R. 95) he was certainly not going to admit it (R. 96), to which defense counsel said "I would, of course, respectfully object" (R. 96). Defense counsel made another effort to persuade Judge Holtzoff to admit the recantation statement (R. 96), but Judge Holtzoff reiterated "I am not going to admit it" (R. 97). Defense counsel made yet another effort to continue the argument (R. 97), but Judge Holtzoff told him that although he could have it marked for identification, "I am not going to admit it, in view of the fact that it is not in his handwriting" (R. 97). Having been told expressly and four times by Judge Holtzoff that the document would not be admitted, surely there was no need for defense counsel to persist even further by making a fifth attempt.

(B) On another ground the Government's brief (pages 41-42) also seeks to avoid meeting, or even discussing, the legal issues raised by Judge Holtzoff's refusal to admit Artis' recantation statement. The Government now says there was not any showing that Artis' recantation statement was made subsequent to the first trial.

There are two separate answers to this. First, there was sufficient showing that the recantation statement was made subsequent to the first trial. Second, even if it had been made prior to the first trial, the applicable rules of evidence would still require that it be admitted.

First, as the record makes plain, the Artis recantation was offered as a subsequent recantation statement and was dealt with by Judge Holtzoff entirely on that basis. Defense counsel's initial reference to the document was that he had a writing signed by Artis "stating that the testi-

mony that he gave [at the first trial], to which Mr. Flannery [the prosecutor] refers, was just not so" (R. 91), and Judge Holtzoff commented "the fact that he later recanted his testimony, if he did, would not affect its admissibility" (R. 91). Defense counsel next said that "at the time he [Artis] first testified, this statement that I have signed by the gentleman was not in existence, was not available to defense counsel" (R. 91-92). The entire subsequent colloquy at the trial was on the assumption and the understanding that the document was being offered as a recantation executed subsequent to Artis' testimony at the first trial (R. 92-97). The prosecutor raised some question as to whether the document was genuine (R. 92), and defense counsel immediately agreed to turn it over to the FBI for comparison with other specimens of Artis' handwriting (R. 92, 94). If the prosecutor or the judge had raised any question—such as the one now suggested by the Government's brief nearly two years later—as to whether the statement was executed prior to, rather than subsequent to, Artis' first-trial testimony, then the details of this matter could have been even further developed at the trial—if indeed Judge Holtzoff would have permitted this when he had ruled four times that, assuming Artis' signature to be genuine, nevertheless he was excluding the recantation statement.

Even more far-fetched is the further suggestion in the Government's brief (page 42) that "it is reasonable to conclude that it was drafted shortly after Artis' cerebral vascular accident in July 1958, well before his first trial testimony" on December 11, 1958. The Government bases this suggestion on the facts that the Artis statement includes the sentence "I have just suffered a stroke" (R. 22) and a medical record shows Artis had been admitted to a

hospital on July 19, 1958, suffering from a stroke (R. 141).[2] The Government's brief omits to say that this medical record only covers the period ending December 4, 1958 (R. 140-141), and hence does not include a record of the severe illnesses suffered by Artis subsequent to the first trial, which culminated in Artis' being unavailable as a witness at the second trial. Moreover, the recantation statement says it is made "to clear my own conscience" and "for the benefit of clearing my conscience" (R. 22). If the recantation, instead of the first-trial testimony, is true, then Artis—having been classified as a fugitive (R. 140) and not having been arrested until November 25, 1958, when he was found in North Carolina (R. 126)—would have had no occasion to "clear his conscience" just after his July 1958 stroke or indeed until after he had given false testimony at the first trial. Assuming Artis' first-trial testimony was to be admitted at all, the jury should not have been deprived of the opportunity to draw its own conclusions on the matter.

Second, even if Artis had executed the statement prior to the first trial, the statement should still have been admitted under the applicable rules of evidence. Petitioner's brief (pages 51-55) has shown the reasons why *Mattox* v. *United States*, 156 U.S. 237, 244-250, ought not be applied, and why a subsequent recantation by a witness who has become unavailable ought not to be excluded merely because the witness cannot be given an opportunity to deny or explain making such statements. The applicable principle, however, is by no means confined to statements which the witness makes subsequent to his first-trial testimony.

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[2] The hospital where Artis was admitted in 1958 was not in the Washington area but was the Veterans Administration Hospital, Durham, North Carolina (R. 141).

For example, in the Uniform Rules of Evidence,[3] subsection 3 of Rule 63 deals with depositions and prior testimony as one of the exceptions to the hearsay rule. It is then provided in Rule 65:

> "Rule 65. Credibility of a Declarant. Evidence of a statement or other conduct by a declarant inconsistent with a statement received in evidence under an exception to Rule 63 is admissible for the purpose of discrediting the declarant, though he had no opportunity to deny or explain such inconsistent statement. Any other evidence tending to impair or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness."

Thus it is clear that under the modern rule—which the accompanying Comment states to be "the generally recognized rule"—evidence of the inconsistent statement is admissible whether the inconsistent statement was made subsequent to or prior to the unavailable witness' first-trial testimony.[4]

Accordingly, under any theory the Artis statement should have been admitted for the jury to assess—and so also should the evidence which Judge Holtzoff cut the defense off from adducing, through the witness Bush, concerning statements made by Artis in February 1958, before the first trial, directly contradicting testimony which Artis subsequently gave at the first trial (petitioner's brief, pages 16-17, 54). When Judge Holtzoff ruled (R. 143) that the

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[3] Drafted by the National Conference of Commissioners on Uniform State Laws and by it approved on August 22, 1953; approved by the American Bar Association, August 28, 1953; approved by the American Law Institute, May, 1954.

[4] See also the same position set forth in Rule 531(a) of the earlier Model Code of Evidence, adopted by the American Law Institute, May 15, 1942.

latter testimony was inadmissible because Artis had never been confronted with anything he had said to the witness Bush, and further told defense counsel "I am not going to hear argument on this" (R. 143), he was making a ruling directly in conflict with the modern law of evidence.

(C) As petitioner's brief (pages 57-59) shows, the circumstances were unusual in numerous ways which made the use of the Artis first-trial testimony highly unfair to petitioner. The point is not merely that Judge Holtzoff, under these circumstances, clearly abused his discretion in allowing the Artis testimony to be introduced by the prosecutor and then in failing to protect the defendant's rights to have the subject in its entirety placed before the jury. More than that, Judge Holtzoff failed even to recognize that he had a judicial discretion, under the circumstances, to exclude the Artis first-trial testimony if required in the interests of justice. In determining that the testimony would be admitted he compounded the errors by ruling: "I do not think it is within the discretion of the Court. I think that if the facts are established as to the inability to produce the witness, it is a matter of right to read his prior testimony" (R. 94). For all the errors on the Artis matter which have been discussed in petitioner's brief and in this reply brief, the judgment should be reversed.

IV.

As to the Rule on Accomplice Testimony.

The Government's brief (pages 49-50) says "it is highly unlikely that the jury based its verdict solely on Artis' evidence even as to the incidents as to which he did testify". The record provides no support for this speculative assertion by the Government, and Judge Holtzoff's instructions (petitioner's brief, pages 23, 63) told the jury, most unambiguously, that they might convict on the basis of uncorroborated testimony of the accomplice Artis. If this charge was wrong, the error was fundamental and far from harmless. *Kotteakos* v. *United States*, 328 U.S. 750; *Krulewitch* v. *United States*, 336 U.S. 440, 444-445.

V.

As to the Barry Decision.

The Government's brief (pages 50-53) makes a wholly unsupportable effort to distinguish away the decision rendered by the Court of Appeals in *Barry* v. *United States*, 287 F.2d 340. The Government does not deny that the charge given here by Judge Holtzoff, relating to interstate transportation of forged security, was substantially identical with the charge which Judge Holtzoff gave in *Barry*—which the Court of Appeals subsequently held to constitute plain error requiring reversal.

Instead the Government's brief (page 51) claims that here the facts are different because here "there was no claim that petitioner himself either forged the check or uttered it; his guilt depended on his complicity in the forging and uttering". For this reason the Government contends that it was enough that Judge Holtzoff in his charge explained the aiding and abetting principle.

Surely the Government's argument misconceives the law. Before a man can be convicted as an aider and abetter in the offense of interstate transportation of a forged security, he must have knowledge that the security was falsely made and forged. This is just as much an element of the offense to be proved against the man whom the Government seeks to convict as an aider and abetter, as it is an element of the offense to be proved against the man who personally transported the security. In other words, without complicity in all the essential elements of the offense, there has not been an aiding and abetting in the commission of the offense.

Similarly, the Government's reliance (pages 52-53) on a subsequent portion of the charge (R. 179) does not suffice in any way to establish the Government's contention that "There was thus no possibility that the jury could have convicted petitioner without finding that he knew the checks were forged". What Judge Holtzoff told the jury in this portion of his charge was that if petitioner was driving the car with the intention of bringing the party to a store to which a check was to be presented for cashing, if petitioner knew that was the purpose of the trip, then petitioner was an aider and abettor. But the jury should never have been thus given to understand they might convict if they found only that petitioner was driving someone to the store knowing the other person was to present a check for cashing. This was not enough. Unless the jury also found that petitioner knew the money order about to be cashed was a forged instrument, conviction would be wholly improper. *Nye & Nissen* v. *United States*, 336 U.S. 613, 618-619; *United States* v. *Turnipseed*, 272 F.2d 106 (7th Cir. 1959); *United States* v. *Williams*, 341 U.S. 58, 64, note 4. Accordingly, the charge was not only confusing; it was fundamentally in error and plainly insufficient.

Conclusion

For the reasons set forth in petitioner's brief and in this reply brief, the conviction should be reversed and the case remanded with instructions as set forth at page 71 of petitioner's brief.

Respectfully submitted,

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